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In The Supreme Court of the United States

Adam Porter, and Adam Porter Breen, by and through his mother and next friend, Mary LeBlanc,

Petitioner,

v.

Ascension Parish School Board, Robert Cloutare, Superintendent Ascension Parish School Board, in his official capacity, Conrad Braud, Prinicipal East Ascension High School, in his individual and his official capacity, and Linda Wilson, Principal Galvez Middle School, individually and in her official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is off-campus student speech that is neither directed at a school nor intended to be communicated on school grounds entitled to full First Amendment protection or subject to regulation under the standard established in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)?

II. Is a waiver of the right to a hearing required by the Due Process Clause of the Fourteenth Amendment knowing, voluntary and valid where the person waiving the right is informed that the hearing would be futile?

III. Did the lower court err in ruling that the Petitioner's admission that he engaged in the expression at issue constituted an admission of guilt?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the United States District Court for the Middle District of Louisiana and the United States Court of Appeals for the Fifth Circuit are shown in the caption to this Petition.

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The decision of the District Court is reported as *Porter v. Ascension Parish School Board*, 301 F. Supp. 2d 576 (M.D. La. 2004) and is set forth in the Appendix beginning at A-30. A corrected version of this decision also is reported as *Porter v. Ascension Parish School Board*, 2004 U.S. Dist. Lexis 1175 (M.D. La., Jan. 28, 2004).

The decision of the Court of Appeals for the Fifth Circuit is reported as *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004). The order of the Court of Appeals for the Fifth Circuit denying the Petitioner's petition for rehearing is not reported but is set forth in the Appendix beginning at A-4.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 10, 2004 (A-2, 4). The Petitioners timely filed a Petition for Rehearing En Banc in the Court of Appeals, which was denied by an order entered January 12, 2005 (A-1, 3). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of U.S. Const. Amends. I and XIV are set forth in the Appendix at A-70.

STATEMENT OF THE CASE

In 1999, Adam Porter, then fourteen years of age, drew a picture of his school, East Ascension High School, in the privacy of his home. The drawing depicted the school being under siege by a gasoline tanker truck, a helicopter, and a missile launcher.

Adam showed his drawing to his mother, Mary LeBlanc, his younger brother, Andrew Breen, and Kendall Goudeau, a friend who was living with them at the time. The drawing was then stored in a closet in Adam's home.

In March 2001, Andrew, then twelve years of age, was looking for something to draw on and found the sketchpad which contained the picture of East Ascension Parish that Adam had drawn two years earlier. Andrew drew a llama on a blank page of the sketchpad and then took the pad to Galvez Middle School, which he attended, to show his drawing to his teacher.

On the way home from school, a student who was riding the school bus with Andrew started looking at the drawings in Andrew's sketchpad. The student found the sketch that Adam had drawn two years before and immediately showed it to the bus driver. The driver confiscated the pad and, the next morning, showed it to Linda Wilson, principal of Galvez Middle School, and to Myles Borque, in-school suspension coordinator. When Ms. Wilson and Mr. Borque questioned him about the sketch, Andrew stated that Adam had drawn it two years before. Andrew was suspended for possessing the sketch on school grounds.

Ms. Wilson sent the sketch to the school resource officer of East Ascension Parish School, who showed it to Conrad Braud, principal of the school, and to Gwynne

Pecue, assistant principal. Mr. Braud immediately called Adam into the office and began questioning him about the sketch. Adam had no previous disciplinary record.

Adam acknowledged that he had drawn the sketch two years before, in the privacy of his home. School officials then conducted a search of Adam's person and his book bag and found a box cutter with a one-half inch blade that Adam was using in his after-school job at a grocery store. School officials contacted Adam's mother, who immediately went to the school. She then learned that Adam was being recommended for expulsion and received a written notification of expulsion and instructions to keep Adam at home until a formal hearing could be held. No hearing date was set.

Later that same day, Adam was arrested for terrorizing the school and carrying an illegal weapon. He spent four nights in the Donaldsonville, Louisiana, jail.

The following week, Mary LeBlanc talked to the hearing officer for the East Ascension Parish School who informed Ms. LeBlanc that the school board's practice was to regularly decide expulsion hearings against the student recommended for expulsion. The hearing officer also informed Ms. LeBlanc that the school would stay the expulsion and allow Adam to transfer to the Ascension Parish Alternative School, provided Ms. LeBlanc agreed to waive Adam's right to a hearing. Left with no other option, Ms. LeBlanc signed the waiver and Adam was transferred to the Alternative School.

Mary LeBlanc filed suit against the Ascension Parish School Board, Conrad Braud, and Linda Wilson, claiming violations of the First, Fourth, and Eighth Amendments, as well as violations of 20 U.S.C. § 1415 providing equal protection and procedural due process rights.

On summary judgment, the District Court dismissed all claims, finding that Adam's sketch was not entitled to the protection secured by the First Amendment (A-50), the search that the school officials conducted was reasonable (A-55), and that Principal Braud was entitled to qualified immunity (A-64). Ms. LeBlanc appealed on behalf of Adam.

The Court of Appeals for the Fifth Circuit affirmed the District Court's decision that Adam was not entitled to recover on his claims. However, contrary to the ruling in the District Court, the Court of Appeals ruled that Adam's sketch was entitled to First Amendment protection and that those rights had been violated by Principal Braud (A-16, 17). The Court found that the drawing was not student speech on campus. Therefore, the case was not controlled by the decision in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), or *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (A-11, 12). But it recognized the difficulty in determining what standard should be applied to Adam's claim, noting that the several Courts of Appeals have adopted different analyses in determining the protection to be afforded off-campus speech by students (A-12, 13). The Court concluded that the school officials' actions were justified only if it could be found that Adam's drawing was a "true threat" (A-13, 14). Because Adam had not intentionally communicated the drawing, it was not a true threat and his First Amendment rights were violated if he was punished because of the drawing (A-14).

The Fifth Circuit, however, determined that Adam's First Amendment rights were not clearly established at the time Principal Braud had him searched, arrested, and recommended for expulsion. Therefore, Principal Braud's actions were reasonable under the circumstances and he was entitled to qualified immunity (A-20). Adam filed a

motion for rehearing en banc. In an order entered January 12, 2005, the Court of Appeals denied the rehearing (A-3)

ARGUMENT

Recent times stand witness to the application of the First Amendment to students and their rights. This Honorable Court has been called upon several times to decide how to reconcile the provisions of the federal Constitution with state law or school policy infringing on students' rights as citizens of this country. Tragic circumstances of late increase the danger of unwarranted and unconstitutional reaction to the free speech rights of student-citizens.

The danger that the protected speech of students will result in punishment in violation of the First Amendment is increased by the uncertainty over the scope of the First Amendment's protection afforded to off-campus speech. As the Court of Appeals decision below indicates, decisions from other courts make it unclear what analysis should be employed in judging whether school administrators are authorized to punish students for their expressive activities away from campus (A-12, 13). It pointed out that some courts have applied tests applied to other on-campus expression, *see, e.g., Boucher v. School Bd. of School Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998), while others have found that the on-campus speech analysis does not apply.

This Court should grant the instant Petition to resolve the conflict among the Circuit Courts and eliminate, as far as possible, the uncertainty over the First Amendment protection afforded to off-campus speech by students. The issue of off-campus speech will result in even more cases of this kind, in light of the prevalence of the internet. A

definitive statement from this Court in a context afforded by this case will provide school administrators with guidance and prevent the kind of unfortunate overreaction that occurred in this case. In so doing, this Court should affirm the ruling below that, to the extent his drawing resulted in his punishment (which is largely a foregone conclusion), Adam's First Amendment rights were violated and allow Adam to seek compensation for the abuse and indignities he suffered as a result.

Another issue presented here is the validity of waiving a hearing heralded as a constitutionally questionable kangaroo court. The third issue is whether acknowledgment of a speech is, by itself, sufficient to constitute a waiver of an evidentiary hearing. These issues are ripe for this Honorable Court to resolve. Therefore, Petitioner respectfully requests that the Court grant this Petition for Writ of Certiorari.

I. SCHOOL OFFICIALS ARE NOT ENTITLED TO SANCTION A STUDENT FOR OFF-CAMPUS SPEECH THAT INADVERTENTLY REACHES THE SCHOOL GROUNDS WITHOUT THE KNOWLEDGE OR CONSENT OF THE SPEAKER.

The Court of Appeals decision that Adam's off-campus speech was constitutionally-protected expression is consistent with this Court's precedent. In *Papish v. Board of Curators of University of Missouri,* 410 U.S. 667 (1973), this Court reversed a decision of the Eighth Circuit Court of Appeals that a student's newspaper containing "forms of indecent speech" distributed on campus was not protected by the First Amendment. The Court found that the student had been expelled due to the "...disapproved *content* of the newspaper rather than the time, place, or manner of its

distribution." *Id.* at 670. Finding that the distribution of the newspaper caused no disruption of the campus order and violated no rights of other people, the Court reversed the decision of the lower court and ordered that the student be reinstated in the graduate program, writing that "...the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech...." *Id.*

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), involved three high school students who were suspended for wearing black armbands to school in protest of the war in Vietnam. This Court held that the wearing of armbands was "...entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to `pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 506. The *Tinker* decision also made it clear that schools are not exempt from constitutional scrutiny and that the freedom of speech extends to the campus of public schools. *Id.*

Courts have consistently applied the standard set forth in *Tinker* to decide the extent to which students are protected by the First Amendment when their actions take place on school grounds. But some courts have also applied the *Tinker* test to off-campus speech that finds its way on campus without the knowledge or consent of the author of the speech. *See Boucher*, 134 F.3d at 827-28, and *Killion v. Franklin Regional Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

In the instant case, the Fifth Circuit determined that *Tinker* did not apply to off-campus speech, holding that the drawing was expression that did not "happen[] to occur on the school premises[.]" (A-12). Both *Tinker* and *Hazelwood*,

484 U.S. at 271, *involved speech occurring on school* premises. In each case, this Court granted school administrators more control over student speech than would otherwise be allowed under the First Amendment because the speech was in a school. Thus, it was held in *Hazelwood* that the First Amendment "must be applied in light of the 'special characteristics of the school environment.'" *Hazelwood,* 484 U.S. at 266 (quoting *Tinker,* 393 U.S. at 506).

The Fifth Circuit here correctly recognized that Adam's expression could not be the basis for punishment under either the *Tinker* or *Hazelwood* standards because those standards do not apply simply because a student is involved. As this Court wrote in *Tinker,* 393 U.S. at 511:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

Because the special interests that apply in the school environment did not apply here, Adam's drawing could not be the basis of punishment because of a fear of disruption of the school or because the school had some pedagogical interest in regulating the expression involved. Instead, the Court of Appeals properly ruled that Adam's expression was entitled to the full measure of First Amendment protection and was not punishable as a "true threat" (A-16).

This decision is consistent with others recognizing that full First Amendment protection is afforded student off-campus speech. In *Beussink v. Woodland R-IV Sch. Dist.,* 30 F. Supp. 2d 1175, 1180 (D. Mo., 1998), a student created and

posted a webpage on the internet containing offensive and vulgar remarks about the school he attended. He did this on his computer at home and never showed it to anyone. When a friend discovered the message and showed it to a teacher on a school computer, the student was suspended. The court discussed whether the Principal's sanction was appropriate and concluded that "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*." *Id.* at 1180.

Similarly, in *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (D. Mich., 2002), a student, while away from school, created a website entitled "Satan's web page" which contained lists of "people I wish would die," "people that are cool," "movies that rock," "music I hate," and "music that is cool." The page also contained an assignment from Satan to the readers to brutally kill someone and enjoy it. Right below the assignment from Satan, there was a message saying, "P.S. Now that you've read my web page please don't go killing people and stuff then blaming it on me. OK?" After a parent notified the police, the student's school learned of the website and suspended the student, recommending that he be expelled. Analyzing whether the plaintiff's website fell under the school officials' jurisdiction, the court looked at whether the website was created on or with use of school property. Significantly, the court did not take into consideration the fact that other students accessed the website on the school's computers because there was no proof of plaintiff's intent to communicate the website to his school mates. *Id.* at 786. The court only considered the fact that the web page was not created on campus. Because the expression occurred off-campus, the court held that *Tinker* was inapplicable. "The *Tinker* Court dealt with student activities that occurred on school property. ... In this Court's opinion, even looking at Plaintiff's statement in the light most favorable to Defendants, the evidence simply does not

establish that any of the complained of conduct occurred on Kettering property." *Id.* at 784. After finding that the website made no threats, the court determined it was entitled to the protection of the First Amendment and that the student's constitutional rights had been violated.

And in *Thomas v. Board of Education*, 607 F.2d 1043, 1050 (2d Cir. 1979), four high school students who created a sexual-satirical publication entitled "Hard Times" and distributed several issues to older students were suspended by the school. Other sanctions were also imposed. The publication had been created in the students' homes off-campus and after school hours, and no issue was ever sold on school property. *Id.* at 1050. The Second Circuit distinguished the case from *Tinker*, noting: "The case before us, however, arises in a factual context distinct from that envisioned in *Tinker* and its progeny. While prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate." *Id.* Addressing the power that school authorities have to regulate their students' off-campus activities, the court wrote that

> [i]f they possessed this power, it would be within their discretion to suspend a student who purchases an issue of National Lampoon, the inspiration for Hard Times, at a neighborhood newsstand and lends it to a school friend. And, it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and

> teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of Parens patriae.

Id. at 1051 (footnotes omitted).

Decisions by other courts that have applied the *Tinker* analysis to off-campus speech clearly misperceive the scope of that decision. As pointed out above, limits upon the First Amendment rights of students stem from the "special characteristics" of the public school and the interest of school administrators in preserving the school as an environment for learning. Limited First Amendment protection is not justified simply by the fact that the speaker is a student. Lower court decisions that allow regulation of student speech occurring off-campus are plainly wrong and should be disavowed by a ruling in this case affirming that Adam's drawing was protected by the First Amendment.

The writ also should be granted in order to allow Adam to obtain tangible relief for the infringement of his rights. Although the Fifth Circuit correctly found that Adam's off-campus speech was protected by the First Amendment, it determined that this fact was not "clearly established," and so upheld the claim to qualified immunity (A-22). "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting

Anderson v. Creighton, 483 U.S. 635, 640 (1987). The doctrine of qualified immunity protects government officials from liability under 42 U.S.C. § 1983 to the extent they do not have fair notice that their conduct is unlawful. *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

Principal Braud should not have been granted qualified immunity in light of this Court's clear precedent that limited First Amendment protection applies only to speech that occurs on school premises. *Tinker* and *Hazelwood* make clear that it is the "special characteristics of the school environment" that allows school administrators more leeway in regulating student expression. *Hazelwood*, 484 U.S. at 266. This Court has never indicated that students are entitled to less than full First Amendment protection by virtue of their status as students. A reasonable official could not have believed that *Tinker* or *Hazelwood* authorized punishment of the off-campus expression of Adam.

Even if no precedent addressed precisely the facts involved here, it was error to hold that Adam's First Amendment rights were not "clearly established." "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739 (internal citations omitted). "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Id.* at 741 (citing *Anderson*, 483 U.S. at 640). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be 'fundamentally similar.'"

Pelzer, 536 U.S. at 741 (citing *United States v. Lanier*, 520 U.S. 259 (1997)).

In light of this Court's precedent, Principal Braud should have known that Adam's off-campus speech was fully protected by the First Amendment. Thus, it was error for the Court of Appeals to sustain Principal Braud's qualified immunity defense. The instant petition should be granted to allow Adam to pursue his claim and obtain redress for the deprivation of his First Amendment rights.

II. ANY WAIVER OF A SCHOOL BOARD HEARING WAS INVALID BECAUSE THE HEARING OFFICER STATED THAT THE HEARING WOULD BE FUTILE.

The Fifth Circuit also found that Adam's Fourteenth Amendment rights were not violated because Mary LeBlanc, Adam's mother, waived Adam's right to a hearing in front of the school board. However, the validity of Ms. LeBlanc's waiver is questionable in light of the circumstances surrounding her decision. Specifically, in a conversation she had with one of the hearing officers, Ms. LeBlanc was informed that these kinds of hearings are not decided in favor of the student (A-7, 34). This statement dictated that Ms. LeBlanc waive Adam's right to the hearing. The case law is silent on the validity of a waiver when the hearing so waived is deemed by the hearing officer itself to be anything but fair.

Goss v. Lopez, 419 U.S. 565, 574, 95 S. Ct. 729 (1975), opines: "The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is

protected by the due process clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." The Court further stated that a student's property interest in education, as well as his liberty interest in reputation, cannot be curtailed by sanctions "imposed by any procedure the school chooses, no matter how arbitrary." *Id.* at 575.

Discussing the protections of the due process clause, this Court held in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), that "at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." In *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 960 (1961), the Fifth Circuit established certain rules that ensure the rights of a student to the protection of the due process clause. It stated that the student "should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed ... we feel that the requirements of due process of law will have been fulfilled." *Dixon*, 294 F.2d at 159.

These decisions deal with the respondents' violation of the due process clause due to their failure to properly inform petitioner of his right to a hearing. The jurisprudence, however, is silent as to whether the due process clause requirements are satisfied when the notice includes a warning that the hearing will be concluded against the accused. In this case, the Fifth Circuit found that

Adam's Fourteenth Amendment rights were not violated due to his mother "waiving" the right to the hearing.

In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled on other grds., Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court held that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights." *Johnson* established that the decision to waive one's own constitutional rights must be made intelligently and courts must look at "the particular facts and circumstances surrounding that case" before deciding whether the waiver is valid. *Id.* A waiver of rights secured by the Constitution is not valid unless it was neither produced "by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183 (1897).

In her son's case, Mary LeBlanc does not dispute the fact that she received notice of the hearing and the other options. However, Ms. LeBlanc does dispute the options that the hearing officer gave her. When presenting Ms. LeBlanc with the possibility of a school board hearing, the hearing officer also told her that the hearings almost never go in favor of the accused student. Ms. LeBlanc was, in effect, left with no choice, as a hearing worthy of the name was not available. Therefore, she reluctantly agreed to transfer Adam to an alternative school. The hearing officer informed Ms. LeBlanc that the school board's approval of the transfer was contingent upon Ms. LeBlanc waiving her son's right to the hearing. The hearing officer's statements and "guarantees" constitute direct or implied promises or improper influences. *Bram*, 168 U.S. 532, 542. Mary LeBlanc and her son undoubtedly had, by design of the school board, no choice. Therefore, any purported waiver of the

right to a hearing was invalid, and Adam did not receive the process he was due under the Fourteenth Amendment.

III. THE ADMISSION OF AUTHORSHIP OF THE DRAWING WAS NOT AN ADMISSION OF GUILT.

Relying on its previous decision in *Keough v. Tate County Bd. of Educ.*, 748 F. 2d 1077 (5th Cir. 1984), the Fifth Circuit found that Adam Porter's acknowledgment that he drew the picture automatically eliminated the possibility of any violations of his Fourteenth Amendment rights by the school board. In *Keough*, a high school student was called into the principal's office to discuss a minor incident that had occurred in the study hall. The student became angry, cursed the principal, and then left school without permission. When he returned, the principal informed him that he was looking at a ten-day suspension. The student again got angry and belligerent and challenged the principal to a fight. *Id.* at 1079. The court found that the school officials did not violate the student's Fourteenth Amendment rights when they suspended him because the student admitted to having cursed the principal and left school without permission and also admitted to other actions that were in violation of school policy.

Keough is distinguishable on its face from the case *sub judice*. First, the incidents in *Keough* took place on the school grounds in the principal's office, while Adam Porter's speech was completely off-campus. Second, the Fifth Circuit found that Adam's drawing constitutes free speech, while the student's in *Keough* does not. Third, at the time the student in Keough admitted his guilt, he had already been notified of the charges, his right to a hearing, and the sanctions that were to be applied. By contrast, at the time Adam Porter acknowledged that he had drawn the picture, there were no charges against him. There was only a line of

questioning coming from Principal Braud. Had he known that Principal Braud would suspend him, recommend him for expulsion, and have him imprisoned, surely Adam would have consulted with his family or friends before waiving his right to due process by acknowledging the drawing, like the Fifth Circuit determined.

The court below wrote that "one of the primary purposes of expulsion hearings is that of confirming whether the student threatened with expulsion actually committed the conduct for which he is being punished. Once a student has admitted his guilt, the need for a hearing is substantially lessened." (A-27). However, there was no such admission. Drawing a picture is not evidence of approval of its contents. Apparently, no one at the school board even questioned Adam about his intent in accomplishing the drawing. And that is at the heart of the constitutional safeguards.

But even if Adam had intended approval, he had a constitutional right to say so as long as he did not resort to violence. In fact, Adam's reputation for being one of the most docile students, as Principal Braud characterized him, makes it just as likely that his drawing was a protest against acts of violence. Picasso's "Guernica" is just such a rebuke to Franco, as was Goya's "5th of May" to Napoleonic abuses. Surely no one believes that Mel Gibson's *The Passion of the Christ* is meant to foster widespread crucifixion.

Butler v. National Home for Disabled Volunteer Soldiers, 144 U.S. 64, 72 (1892), holds that "nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain or quality [sic] it, so far as the truth will permit." Contrary to the Supreme Court's long-standing decisions, the Fifth Circuit held Adam's acknowledgment of his drawing against him. Therefore, Adam Porter respectfully requests

that this Honorable Court grant his Writ to correct the Fifth Circuit's misapplication of the law.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Court grant the Petition and that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit in order that this Court may review and reverse the judgment in this case.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

Adam Porter, and Adam Porter Breen, by and through his mother and next friend, Mary LeBlanc,

Petitioner,

v.

Ascension Parish School Board, Robert Cloutare, Superintendent Ascension Parish School Board, in his official capacity, Conrad Braud, Prinicipal East Ascension High School, in his individual and his official capacity, and Linda Wilson, Principal Galvez Middle School, individually and in her official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

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NEW ORLEANS, LA 70130

January 12, 2005

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 04-30162 Porter v. Ascension Parish Sch
USDC No. 02-CV-274

Enclosed is an order entered in this case.

Sincerely,

CHARLES R. FULBRUGE III, CLERK

BY: _____
Cindy Broadhead, Deputy Clerk
504-310-7707

Mr. Dan Michael Scheuermann
Mr. Gustave A. Fritchie III

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30162

ADAM PORTER, ET AL
Plaintiffs

ADAM PORTER
Plaintiff - Appellant

v.

ASCENSION PARISH SCHOOL BOARD; ROBERT CLOUTARE, Superintendent, in his Official Capacity; CONRAD R. BRAUD, Principal, East Ascension High School, Individually and in his Official Capacity; LINDA WILSON, Principal of Galvez Middle School, Individually and in her Official Capacity.
Defendants - Appellees

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

---

ON PETITION FOR REAHEARING EN BANC

(Opinion 12/10/04, 5 Cir., _____, _____ F.3d _____)

Before KING, Chief Judge, HIGGINBOTHAM, and DAVIS, Circuit Judges

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th CIR. R. 35), the Petition for Rehearing is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th CIR. R. 35), the Petition for Rehearing is DENIED.

ENTERED FOR THE COURT

_____

United States Circuit Judge

United States Court of Appeals
Fifth Circuit

In the United States Court of Appeals
For the Fifth Circuit

No. 04-30162

ADAM PORTER, ET AL,

Plaintiffs

ADAM PORTER,

Plaintiff - Appellant,

Versus

ASCENSION PARISH SCHOOL BOARD, et al., Appellees

Defendants -

Appeal from the United States District Court for the Middle District of Louisiana

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Before KING, Chief Judge, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judgde:

This case highlights the difficulties of school administrators charged to balance their duty to provide a safe school with the constitutional rights of individual

students when violence in schools is a serious concern. We must decide whether officials within the Ascension Parish School District responded appropriately in removing Adam Porter from East Ascension High School and requiring him to enroll in an alternative school for a sketch depicting a violent siege on the EAHS that he had drawn two years earlier, and was accidentally taken to school by his younger brother. We hold that the only defendant left in the case, EAHS principal Conrad Braud, is entitled to qualified immunity with respect to Adam's First Amendment claim, and affirm the district court's grant of summary judgment.

I

A

When Adam Porter was fourteen years old, he sketched a drawing of his school, East Ascension High School, in the privacy of his home. It was crudely drawn, depicting the school under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons. The sketch also contained obscenities and racial epithets directed at characters in the drawing, a disparaging remark about EAHS principal Conrad Braud, and a brick being hurled at him. After completing the sketch, Adam showed it to his mother, Mary LeBlanc, his younger brother, Andrew Breen, and a friend, Kendall Goudeau, who was living with the family at the time. The sketchpad was then stored in a closet in Adam's home.

Two years later, Andrew Breen, then age twelve, rummaged through the closet looking for something to draw on, and came upon Porter's sketchpad. Andrew drew a llama on a blank page in the pad, and then took the pad to his school, Galvez Middle School, to show his drawing to his teacher. On March 15, 2001, while riding the bus on his way home from school, Andrew allowed a friend student to see his drawing. While flipping through the pages of the

pad, the student came upon the two-year old drawing by Adam and showed it to the bus driver, Diane McCauley, exclaiming, "Miss Diane, look, they're going to blow up EAHS." McCauley immediately confiscated the pad. On the following morning McCauley took the pad to Linda Wilson, the principal of Galvez Middle School, and Myles Borque, the in-school suspension coordinator. After viewing Adam's drawing, Wilson called Andrew to her office where he was questioned about the drawing and his book bag was searched. In response to questioning by Wilson and Borque, Andrew admitted that Adam had drawn the picture. Andrew was then suspended for possessing the drawing on school grounds.

The sketchpad was sent to EAHS where school resource officer Robert Rhodes interrupted a meeting to show the drawing to principal Braud and assistant principal Gwynne Pecue. Alarmed, Braud and Pecue immediately summoned Adam to Rhodes's office where he readily admitted that he had drawn the sketch two years earlier. School officials then searched Adam's book bag and his person and found a box cutter with a one-half inch exposed blade in his wallet. The officials also found notebooks in Adam's bag containing references to death, drugs, sex, depictions of gang symbols, and a fake ID. Adam explained that he used the box cutter in his after-school job at a local grocery store. Although unclear as to when, the record indicates that he later explained that the references to death were part of a homework assignment, and that the "gang symbols" referred only to a group of persons with whom Adam associated, and who Braud did not consider to be a threat.

Adam's mother, Mary LeBlanc, was contacted, and after arriving at EAHS, was told that Adam was being recommended for expulsion. Adam and his mother were then allowed to leave carrying a written recommendation for expulsion and instructions for Adam to remain at home until a hearing could be held. No hearing date was

immediately set. Shortly thereafter, Officer Rhodes obtained a warrant to arrest Adam for "terrorizing" EAHS, and Adam was held for four nights at the Donaldsonville jail on charges of terrorizing the school and carrying an illegal weapon.

A week later, on March 23, 2001, Mary LeBlanc met with Linda Lamendola, hearing officer for the Ascension Parish School Board. LeBlanc was advised that expulsion hearings were regularly decided in school's favor, and that Adam could immediately enroll in the Ascension Parish Alternative School and continue his education if she waived the hearing. LeBlanc signed the waiver form provided by Lamendola, and Adam was enrolled in the alternative school. The following August, Adam was allowed to re-enroll at EAHS, but dropped out in March, 2002.

B

Mary LeBlanc filed suit on behalf of Adam and Andrew against the Ascension Parish School Board, Robert Cloutare in his official capacity as superintendent of the School Board, Conrad Braud individually and in his official capacity as principal of EAHS, and Linda Wilson individually and in her official capacity as principal of Galvez Middle School. The suit, brought under 42 U.S.C. §1983, alleged violations of the First, Fourth and Eighth Amendments, and a denial of equal protection and procedural due process and rights secured by 20 U.S.C §1415.[1] Defendants filed a motion for summary judgment asserting that no constitutional violation could be shown as

[1] 20 U.S.C.A. § 1415 (2000) (providing parents of disabled children with certain procedural safeguards regarding the evaluation, placement and education of their children within the public school system).

a matter of law and claiming the defense of qualified immunity.

The district court dismissed without objection plaintiffs' equal protection, Eighth Amendment, and the § 1415, and plaintiffs agreed to dismiss all claims against Linda Wilson. The district court analyzed Adam's First Amendment claim, and concluded that his drawing was not entitled to protection under any of three different standards.[2] The court then disposed of Adam's Fourth Amendment claim, finding that the school's search and detention of him was reasonable.[3] The court next found that Adam's procedural due process claim was unavailing based on Adam's admission that he had drawn the sketch and that the items found in his book bag and on his person belonged to him, and LeBlanc's signed waiver of his right to a hearing.[4]

Next, the court found that even if Adam had established a violation of his rights, Braud was entitled to qualified immunity.[5] Finally, the court held that Adam had produced no evidence of a policy or custom on the part of the Ascension Parish School Board leading to a violation of his rights, precluding his official capacity claims against Braud and Cloutare.[6]

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[2] *Porter v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576, 582-89 (M.D. La. 2004). In particular, the district court analyzed whether Adam's drawing was protected under (1) the "material and substantial interference" standard set forth in *Tinker v. Des Moines Indep.* Cmty. *Sch. Dist.*, 393 U.S. 503 (1969), and *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001); (2) the "true threat"
standard set forth in *Watts v. United States*, 394 U.S. 705 (1969), and *Doe v. Pulaski County Special 5ch. Dist.*, 306 F.3d 616 (8th Cir. 2002); and (3) our nonviewpoint based approach set forth in *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 1996).

[3] *Porter*, 301 F. Supp. 2d at 589-92

[4] *Id.* at 592-95

[5] *Id.* at 595-97.

[6] *Id.* at 597-98.

Based on these findings, the district court entered summary judgment for the defendants. Adam filed a timely notice of appeal from this judgment.

II

"We review the grant of a motion for summary judgment de novo."[7] Summary judgment is appropriate when "the pleadings and the evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law."[8] In the present case, the district court granted the defendants' motion for summary judgment on grounds that plaintiffs had failed to raise a material fact issue with respect to any of their constitutional claims, and on the alternative ground that defendant Braud was entitled to summary judgment based on qualified immunity.[9]

Although denominated in the alternative, these holdings follow our analysis for determining whether a state official is entitled to qualified immunity. When reviewing a grant of summary judgment based on qualified immunity, we must first determine whether a plaintiff successfully alleged facts showing the violation of a constitutional right by state officials, and whether there is a genuine issue of material fact that the violation occurred.[10] "If there is no constitutional violation, our inquiry ends." [11]

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[7] *Pluet v. Frasier*, 355 F.3d 381, 383 (5th Cir. 2004)

[8] *Id.* (citing FED. R. CIV. P. 56 (c))

[9] Adam did not brief on appeal the argument that the district court erred in granting summary judgment for Braud and Cloutare on claims raised against them in their official capacity. Therefore, we *will* not address this argument. *See Proctor Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.l (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument.").

[10] See *Saucier v. Katz*, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken *in* the light most favorable to the party asserting injury,

If we determine that the plaintiff's alleged facts make out a constitutional violation, we then ask whether the right allegedly violated was "clearly established" such that "it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted."[12] We have found that a "right can be said to have been clearly established only if all reasonable officials in the defendant's position would have concluded that the challenged state action was unconstitutional."[13]

Even if we find that the right was clearly established at the time of the alleged violation, however, a defendant will still be entitled to qualified immunity if the defendant's conduct was "objectively reasonable in light of 'clearly established' law at the time of the violation."[14] The reasonableness of an official's actions must be assessed in light of "the facts available to him at the time of his action and the law that was clearly established at the time of the alleged illegal acts."[15]

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do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry."); *Finch v. Fort Bend Indep. Sen. Dist.*, 333 F.3d 555, 561 (5th Cir. 2003) (when considering whether to grant a summary judgment motion based on qualified immunity, district court must determine whether a material fact question exists regarding whether the defendant engaged in conduct violating the plaintiff's clearly established rights); *Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844, 846 (5th Cir. 2003) (finding that first question in qualified immunity analysis is whether, "viewing the facts *in* a light most favorable to the plaintiff. . . the plaintiff has alleged the violation of a constitutional right").

[11] *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003).

[12] *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Barrow*, 332 F.3d at 846 (second question in qualified immunity analysis is whether the "constitutional right was clearly established when the violation supposedly occurred").

[13] *Barrow*, 332 F.3d at 846 (citing *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 284 (5th Cir. 2002))

[14] *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 279 (5th Cir. 2003) (quoting *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991)).

[15] *Id.* at 284 (quoting *Hays County Guardian v. Supple*, 969 F.2d 111, 125

A

1

Adam first claims that EARS violated the First Amendment in removing him from school based on the contents of his drawing. Uncertain as to the appropriate legal standard under which the drawing was to be analyzed, the district court employed three different approaches before concluding that the drawing was not entitled to First Amendment protection. The parties argue all three standards on appeal.

The first two standards employed by the district court were developed specifically to balance the First Amendment rights of students with the special need of educators to maintain a safe and effective learning environment.[16] The first standard, originally set forth in

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(5th Cir. 199)).

[16] See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484U.S. *260*, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school.") {quoting Bethel 8ch. Dist. v. Fraser, 478 U.S. 675, 685 (198)); *Canady*, 240 F.3d at 441 ("While certain forms of expressive conduct and speech are sheltered under the First Amendment, constitutional protection is not absolute, especially in the public school setting. Educators have an essential role in regulating school affairs and establishing appropriate standards of conduct. ") .

Our court has identified four categories of school regulations aimed at student speech, with each being reviewing under a different standard. These categories are: (1) school regulations directed at specific student viewpoints; (2) school regulations governing student expression involving lewd, vulgar, obscene or offensive speech; (3) school regulations governing student speech related to School-sponsored activities; and (4) school regulations that are viewpoint-neutral and fall into none of the previous three categories. *Id.*, 240F.3d at 441-44. Because EAHS officials did not punish Adam for the lewd, vulgar, obscene or offensive content of his drawing, and because his drawing was not composed as part of a school sponsored activity, the district court correctly declined to examine

Tinker v. Des Moines Independent Community School District, provides that school officials may regulate student speech when they can demonstrate that such speech would substantially interfere with the work of the school or impinge upon the rights of other students."[17] We have found that this standard applies to school regulations directed at specific student viewpoints.[18] The second standard provides that school officials may regulate student speech if the regulation furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."[19] We have found that this standard applies to regulations unrelated to any viewpoint.[20] Both of these standards are applicable to student expression that happens to occur on the school premises."[21]

Given the unique facts of the present case, we decline to find that Adam's drawing constitutes student speech on the school premises. Adam's drawing was completed in his home, stored for two years, and never intended by him to be brought to campus. He took no action that would increase the chances that his drawing would find its way to school; he simply stored it in a closet where it remained until, by chance, it was unwittingly taken to Galvez Middle School by his brother. This is not exactly speech on campus or even speech directed at the campus.[22]

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the drawing under categories (2) and (3).

[17] *Canady,* 240 F.3d at 442 (quoting *Tinker,* 393 U.S. at 508) (internal quotation marks omitted).

[18] *Id.*

[19] *Id* .at 443

[20] *Id.*

[21] *Id.* (quoting *Kuhlmeier,* 484 U.S. at 271).

[22] We are aware of the difficulties posed by state regulation of student speech that takes place off-campus and is later brought on-campus either by the communicating student or others to whom the message was

The third standard employed by the district court in analyzing Adam's drawing was developed to deal with

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communicated. Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in *Tinker* when analyzing off-campus speech brought onto the school campus. *See Boucher v. Sch. Bd. of Sch. Dist. of Greenfield,* 134 F.3d 821, 827-28 (7th Cir. 1998) (student disciplined for an article printed in an underground newspaper that was distributed on school campus); *Sullivan v. Houston Indep. Sch. Dist.,* 475 F.2d 1071, 1075-77 (5th Cir. 1973) (student punished for authoring article printed in underground newspaper distributed off-campus, but near school grounds); *LaVine,* 257 F.3d at 989 (analyzing student poem composed off-campus and brought onto campus by the composing student under *Tinker); Killion v. Franklin Reg'l Sch. Dist.,* 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (student disciplined for composing degrading top-ten list distributed via e-mail to school friends, who then brought it onto campus; author had been disciplined before for bringing top ten lists onto campus); *Emmett v. Kent Sch. Dist. No.* 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying *Tinker* to mock obituary website constructed off campus); *Beussink v. Woodland R-IV Sch. Dist.,* 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (student disciplined for article posted on personal internet site); *Bystrom v. Fridley High Sch.,* 686 F. Supp. 1387, 1392 *(D.* Minn. 1987) (student disciplined for writing article that appeared in an underground newspaper distributed on school campus).

Our analysis today is not in conflict with this body of case law; rather, the fact that Adam's drawing was composed off-campus and remained off-campus for two years until it was unintentionally taken to school by his younger brother takes the present case outside the scope of these precedents. *See Thomas v. Bd. Of Educ., Granville Sch. Dist.,* 607 F.2d 1043, 1050-52 (2d.-Clr. '1979) (refusing to apply *Tinker* to student newspaper published and distributed off campus); *Klein v. Smith,* 635 F. Supp. 1440, 1441-42 *(D.* Me. 1986) (enjoining suspension of student who made a vulgar gesture to a teacher while off-campus); *see also Killion,* 136 F. Supp. 2d at 454 (Although there is limited case law on the issue, courts considering speech that occurs off school grounds have concluded (relying on Supreme Court decisions) that school official's authority over off-campus expression is much more limited than expression on school grounds."); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground,* 7 B.U.J. SCT. & TECH. L. 243, 279 (2001) (noting that *Tinker* is ill-suited to deal with off-campus student expression that is unintentionally brought on-campus by others).

speech constituting a "true threat." As a general rule, the First Amendment prohibits government actors from "dictating what we see or read or speak or hear."[23] However, the government can proscribe a true threat of violence without offending the First Amendment.[24] Speech is a "true threat" and therefore unprotected if an objectively reasonable person would interpret the speech as a "serious expression of an intent to cause a present or future harm."[25] The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly communicated to either the object of the threat or a third person.[26] Importantly, whether

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[23] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

[24] *See Virginia v. Black*, 538 U.S. 343, 359 (2003) (upholding Virginia law prohibiting cross burning with intent to intimidate); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the First Amendment."); *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (finding that the First Amendment permits states to prohibit speech that constitutes a "true threat").

[25] *Doe*, 306 F.3d at 622; see *also United States v. Fulmer*, 108 F.3d 1486, 1490-91 (1st Cir. 1997) (collecting and discussing cases).

[26] *See Black*, 538 U.s. at 359 ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."); *Doe*, 306 F.3d at 624 ("In determining whether a statement amounts to an unprotected threat, there is no *requirement* that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat of violence. However, the speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it." (citing *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002)); *see also United States v. Stevenson*, 126 F.3d 662, 664 (5th Cir. 1997) (finding that, for purpose of *criminalizing* speech as a threat under 18 U.S.C. § 115 (a) (1) (S) and 18 U.S.C. § 871, the speaker need only "intentionally or knowingly [communicate] *his* threat") (quoting *United States* v. *Orozco-Santillan*, 903

a speaker intended to communicate a potential threat is a threshold issue, and a finding of no intent to communicate obviates the need to assess whether the speech constitutes a "true threat."[27]

The Eighth Circuit's decision in *Doe* v. *Pulaski County Special School District*[28] is an illustrative application of these principles to an alleged threat made by a student off-campus but carried on campus by another student. In *Doe*, a boy in junior high school drafted two letters to his former girlfriend containing violent, misogynic and obscenity-laden rants" expressing a desire to assault and murder her.[29] Months later, the boy's best friend discovered the letters, and after first objecting, the boy allowed his friend to read them. The friend later absconded with at least one of the letters and showed it to the girlfriend. In addition, the boy had discussed the violent letters with his former girlfriend in phone conversations, ultimately admitting that he penned the letters.[30]

After obtaining and reading one of the letters, the girlfriend reported the boy to school officials who recommended him for expulsion. The boy's parents filed suit, arguing infringement of his First Amendment rights. The district court held that the letter was protected under the First Amendment, and did not constitute a true threat because the boy did not intend to deliver it to his girlfriend.

F.2d 1262, 1265 (9th Cir. 1990)).

[27] *See Doe*, 306 F. 3d at 624 ("Before we address whether a reasonable recipient would view the letter as a threat, we are faced with a threshold question of whether J.M. intended to communicate the purported threat"); *Orozco-Santillan*, 903 F. 2d at 1266 n.3 ("The only intent requirement [in the true threat analysis] *is* that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat.").

[28] 306 F.3d 616 (8th *Cir.* 2002).

[29] *Id.* at 619.

[30] *Id.* at 619-20.

Reversing the district court, the Eighth Circuit found that a reasonable and objective recipient would regard the letter as a true threat. In addition, the Eighth Circuit found that the boy intentionally communicated the threat because he allowed his friend to read the letter knowing that his friend was also a close friend of his former girlfriend. Furthermore, the boy discussed the letters with his girlfriend on the telephone on multiple occasions.[31]

Unlike the court in *Doe,* we need not decide whether Adam's drawing would constitute a true threat in the eyes of a reasonable and objective person because Adam did not intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment. While it is true that Adam showed his drawing to his mother, brother, and friend Kendall Goudeau, this communication was confined to his own home, and more than two years passed before the drawing serendipitously reached the EAHS campus. That the introduction of the drawing to EAHS was wholly accidental and unconnected with Adam's earlier display of the drawing to members of his household is undisputed. Private writings made and kept in one's home enjoy the protection of the First Amendment, as well as the Fourth.[32] For such writings to lose their First Amendment protection, something more than their accidental and unintentional exposure to public scrutiny must take place.[33]

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[31] *Id.* at 624-25.

[32] *See Stanley v. Georgia,* 394 U.S. 557, 568 (1969) (holding that the First and Fourteenth Amendments prohibit the state's regulatory power from extending to possession by an individual of obscene materials in his home); *Doe,* 306 F.3d at 624 (The government. . . has no *valid* interest *in* the contents of a writing that a person. . . might prepare in the confines of his own bedroom. *H); United States v. Pryba,* 502 F.2d 391, 407 (D.C. Cir. 1974) ("The principle underlying *Stanley.* . . is that the Constitution extends special safeguards to the privacy of the home, in common with a few other special societal institutions.").

[33] The district court expressly rejected the view that threats must first

Because Adam's drawing cannot be considered a true threat as it was not intentionally communicated, the state was without authority to sanction him for the message it contained. Although Adam has produced evidence that his drawing comprise the primary impetus for his expulsion from school, he has not established this as a matter of law. Consequently, a fact issue remains as to whether Adam's First Amendment rights were infringed by EARS, and the district court erred in finding otherwise.

2

Because Adam raised a material fact question with respect to his First Amendment claim, we must proceed to ascertain whether Adam's rights were "clearly established" such that "it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted."[34] "This is not to say that an official action is protected by qualified immunity unless the very act in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[35] Even if we find that Adam's right to First Amendment protection is clearly established, Principal Braud will still receive qualified immunity if his actions were objectively reasonable in light of the circumstances he faced at the time he acted.[36] Qualified immunity should be

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be intentionally communicated before losing First Amendment protection, noting: "Plaintiffs seek to distinguish this case from *Doe* by arguing that Adam did not intentionally disclose his drawing to anyone else. *This does not and should not matter.* What does matter *is* that the drawing did end up in the hands of a student, a bus driver and school administrators. . . ," *Porter*, 301 F. Supp. 2d at 588 (emphasis added). This conclusion erroneously ignoresthe clear dictate that "true threats" must first be communicated in some knowing and intentional manner.

[34] *Anderson*, 483 U.S. at 640; *see Mace*, 333 F.3d at 623-24 (discussing two-step qualified immunity analysis).

[35] *Anderson*, 483 U.S. at 640 (1987).

[36] *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

recognized if officials "of reasonable competence could disagree on [whether a particular action is lawful]."[37] The Supreme Court has observed that the protection afforded by qualified immunity is broad, protecting "all but the plainly incompetent or those who knowingly violate the law."[38]

It is indisputable that expressions such as Adam's drawing, provided that they do not constitute a true threat, are entitled to First Amendment protection. It is also clear that such drawings are entitled to diminished First Amendment protection when composed by a student on-campus, or purposefully brought onto a school campus where they become on-campus speech subject to special limitations.[39] The line dividing fully protected "off-campus" speech from less protected "on-campus" speech is unclear, however, in cases such as this involving off-campus speech brought on-campus without the knowledge or permission of the speaker.

Many courts have applied the *Tinker* standard in evaluating off-campus student speech later brought on-campus by persons other than the speaker. These cases have dealt with such things as "underground" student newspapers distributed off-campus,[40] student run websites

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[37] *Hope v. Pelzer*, 536 U.S. 730, 752 (2002) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (internal quotation marks omitted).

[38] *Id.* (quoting *Malley*, 475 U.S. at 341) (internal quotation marks omitted).

[39] *See Kuhlmeier*, 484 U.S. at 266 (" [T]he First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings and must be applied in light *of* the special characteristics of the school environment.").

[40] See *Boucher*, 134 F.3d at 827-28 (applying Tinker and finding that article advocating "hacking" school computers allowed school officials to reasonably forecast that substantial disruption *of* school functions would ensue); *Shanley* v. *N.E.* Indep. *Sch.* Dist., 462 F .2d 960, 970-75 (5th Cir. 1972) (analyzing student newspaper published off-campus and occasionally taken on-campus by others under Tinker while noting that "it is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts"); *Sullivan*, 475 F.2d at 1076 (applying Tinker and finding that

created on off-campus computers,[41] and various writings brought on-campus by students other than their original author.[42] Although reaching differing conclusions as to the legality of restrictions placed upon the speech in question, these cases consistently approach off-campus speech brought on-campus as subject to regulation under *Tinker's* "material and substantial" disruption test.

Not all courts have adopted this approach, however, and some have found that off-campus speech is entitled to full First Amendment protection even when it makes its way onto school grounds without the assistance of the speaker.[43] Still others have adopted a combination approach, analyzing off-campus speech under a flurry of standards in an effort to comprehensively address all possible legal approaches.[44] Frustrated by these

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student newspaper published off-campus did not substantially disrupt school activities).

[41] *See Emmett,* 92 F. Supp. 2d at 1090 (applying Tinker to mock obituary website constructed off-campus); *Beussink,* 30 F. Supp. 2d at 1180-82 (applying Tinker to student homepage built at an off-campus computer and accessed by other students on-campus; granting request for injunction in favor *of* student against 10-day suspension).

[42] *See Killion,* 136 F. Supp. 2d at 455 (applying Tinker to "top-ten" list authored by a student off-campus, and taken on-campus by others without his express instruction).

[43] *See Thomas,* 607 F.2d at *1050* ("[B]ecause school officials ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."); *see also Bethel Sch.* Dist. *No. 403 v.* Fraser, 478 U.S. 675, 688 (1986) (Brennan, *J.,* concurring) (noting that student who was penalized for making lewd comments during a School-sponsored debate could not be punished had he "given the same speech outside of the school environment. . . simply because government officials considered his language to be inappropriate. . .").

[44] *See Mahaffey v. Aldrich,* 236 F. Supp. 2d 779, 783-86 (E.D. Mich. 2002) (analyzing an off-campus website under *Tinker* and the true threat analysis while citing to *Thomas* for the proposition that school officials

inconsistencies, commentators have begun calling for courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation.[45]

Because Adam's drawing was composed off-campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him to EAHS or publicized in a way certain to result in its appearance at EAHS, we have found that the drawing is protected by the First Amendment. Furthermore, we have found that it is neither speech directed at the campus nor a purposefully communicated true threat. However, a reasonable school official facing this question for the first time would find no "pre existing" body of law from which he could draw clear guidance and certain conclusions. Rather, a reasonable

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have limited authority over off-campus student expression). This appears to be the approach adopted by the district court below.

[45] *See, e.g.*, Robert Richards & Clay Calvert, *Columbine Fallout: The Long Term Effects on* Free *Expression Take Hold in Public Schools*, 83 B.U.L. REV. 1089, 1116-20 (2003)(questioning whether school officials should ever have jurisdiction over student speech that takes place off-campus, and is later transported on-campus by another without the communicating student's permission) ; Calvert, *supra* note 22, at 270-75 (2001) (noting that *Tinker* and its progeny do not apply to off-campus student speech that is not "brought" by the student onto the school campus); *see also* Sarah Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in* Need *of Redirection, 2003* B.Y.U. EDUC. & L.J. 663, 672-73 *(2003)* (noting that *Tinker, Fraser,* and *Kuhlmeier,* while possessing fact patterns far removed from today's school environments, continue to be applied to "new facts in new places"); William Bird, Comment, *True Threat Doctrine and Public School Speech-An Expansive View of a School's Authority* to *Discipline Allegedly Threatening Student Speech Arising Off Campus:* Doe v. Pulaski County Special School District, 26 U. ARK. LITTLE ROCK L.REV. 111, 128 (2003) (" [Courts have] failed to establish clear guidance as to how far the First Amendment extends *in* protecting off campus student speech. . . . Many courts have extended *Tinker* to apply to off-campus speech, while others have refused to recognize the school's disciplinary authority simply because of the speech's off campus origin.")

school official would encounter a body of case law sending inconsistent signals as to how far school authority to regulate student speech reaches beyond the confines of the campus.

Given the unsettled nature of First Amendment law as applied to off-campus student speech inadvertently brought on campus by others, the contours of Adam's right to First Amendment protection in the present case cannot be deemed "clearly established" such that it would be clear to a reasonable EAHS official that sanctioning Adam based on the content of his drawing was unlawful under the circumstances. Thus, Braud is entitled to qualified immunity.

Even if Adam's rights were clearly established at the time of his expulsion, Braud's determination that the drawing was not entitled to First Amendment protection was objectively reasonable. The Supreme Court has observed that, even when a particular legal doctrine is clearly established, "[i]t is sometimes difficult for an [official] to determine how the relevant legal doctrine will apply to the factual situation the [official] confronts."[46]

The record indicates that, at the time he recommended Adam for expulsion, Braud was aware that Adam was responsible for the drawing, that the drawing was two or three years old, and that the drawing had been brought to Galvez Middle School by Adam's younger brother. These facts raise the subtle but important legal questions of whether the drawing constitutes on-campus speech, or an intentionally communicated threat. Although we have answered both of these queries in the negative, we cannot say that all reasonable school officials facing these circumstances would reach the same conclusion. For example, looking to case law holding that *Tinker* applies to a student's website created off-campus and later accessed on

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[46] *Saucier*, 533 U.S. at 205.

campus by others without the student's knowledge or encouragement, a reasonable school official might find that Adam's drawing is on-campus speech subject to regulation under the *Tinker* test.[47]

The Supreme Court has noted the particular relevance of the qualified immunity doctrine to cases such as this, in which school officials are required to make decisions without the benefit of legal or factual clarity: As with executive officers faced with instances of civil disorder, school officials, confronted with student behavior causing or threatening disruption, also have an "obvious need for prompt action, and decisions must be made on factual information supplied by others." Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion with the scope of his official duties. . . Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation."[48] Without condoning violations of student's constitutional rights, qualified immunity recognizes that school officials, such as Principal Braud, must be allowed to make reasonable mistakes when forced to act in the face of uncertainty.

Given the benefit of hindsight, the effort to fault Principal Braud for failing to conduct a more thorough investigation into the facts has purchase. For instance, Braud could have spoken with Andrew Breen about how he acquired the drawing, or queried Kendall Goudeau and other members of Adam's friend group about whether

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[47] *See, e.g., Mahaffey,* 236 F. Supp. 2d at 783-86; *Emmett,* 92 F. Supp. 2d at 1090.

[48] Wood *v. Strickland,* 420 U.S. 308, 319 (1975) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 246 (1974) and *Pierson v. Ray,* 386 U.S. 547, 554 (1967).

Adam had recently discussed the drawing or shown it to them. In fairness, however, it was reasonable for Braud to forgo further investigation given LeBlanc's waiver of Adam's right to a hearing. By waiving the hearing, LeBlanc eliminated an important opportunity for Braud and the Ascension Parish School Board to develop the facts more fully.

Given the unique facts of the present case, we find that Braud acted without the benefit of established law that was clear in its application to these facts, and in an objectively reasonable manner. Thus, he is entitled to qualified immunity with respect to Adam's First Amendment claim.

B

Adam's second claim was that EAHS officials violated the Fourth Amendment" by searching his book bag and his person immediately after he admitted that the drawing was his. Finding that the search was reasonable, the district court held that Adam had failed to raise a material fact issue regarding his Fourth Amendment claim. We agree that the search was reasonable under the circumstances, and therefore did not violate Adam's Fourth Amendment rights.

Students have a constitutional right under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures while on school premises.[49] At the same time, the "accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause"; rather, the legality of

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[49] See New *Jersey v. TLO*, 469 U.S. 325, 334-37 (1985).

school searches depends upon the "reasonableness, under all the circumstances, of the search."[50]

The action must be "justified at its inception"[51] and must be "reasonably related in scope to the circumstances which justified the interference *in* the first place."[52]
Under ordinary circumstances, a search of a student by a teacher or other school official will be justified "at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonable related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[53]

Under the circumstances present at the time the search of Adam and his book bag was conducted, EARS officials had reasonable grounds for suspecting that the search would produce evidence of an infraction of a school rule or policy.[54] Specifically, the officials were in possession

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[50] *Id.* at 341; *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S.. 646, 656 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."); *Milligan v. City of Slidell*, 226 F.3d 652, 654-55 (5th Cir. 2000) ("The [Supreme] Court [has] indicated that although the Fourth Amendment applies in schools, the nature of those rights is what is appropriate for children in school.").

[51] *TLO*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)(internal quotation marks omitted).

[52] *Id.* (quoting *Terry*, 392 U.S. at 20) (internal quotation marks omitted).

[53] *Id.* at 341-42.

[54] As to the reasonableness of school searches under facts similar to those in the present case, see *Cuesta v. Sch. Bd. of Miami-Dade County*, 285 F.3d 962, 965-69 (11th Cir. 2002) (finding that violent drawings accompanied by threatening words aimed at the school is sufficient to create reasonable suspicion that the a student may intend to harm the school); *Williams v. Cambridge Bd. of Educ.*, 186 F. Supp. 2d 808, 815-16 (S.D. Ohio 2002)

of a drawing depicting numerous violent acts being perpetrated against EAHS, its students, and staff. In addition, Adam had admitted that the drawing was his prior to the initiation of the search. Given that school officials have a significant interest in deterring misconduct on the part of students,[55] and the fact that Adam had admitted to drawing the sketch depicting large-scale acts of violence directed at EAHS, the decision to search Adam was appropriate under the circumstances.[56]

The search was also reasonable in scope and not overly intrusive under the circumstances. Following Adam's admission of responsibility for the drawing, EARS officials searched his book bag, including textbooks and notebooks found in the bag, and Adam's person, including his wallet.

(finding probable cause for detention of students who had discussed bringing guns and bombs to school in the wake of the Columbine massacre when several classmates reported these statements to school officials); *Stockton v. City of Freeport*, 147 F. Supp. 2d 642, 646 (S.D. Tex. 2001) (finding that discovery of threatening letter on school property justified detention of suspected students, and noting that "officials in the Columbine massacre were harshly criticized for *failing* to take action regarding prior signs of problems").

[55] *Milligan*, 226 F.3d at 655 (noting that protecting students and deterring violent acts are "compelling government interests"); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995) ("The Supreme Court has recognized the unique backdrop that schools present for the operation of the fourth amendment, specifically noting that 'the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.'" (quoting *TLO*, 469 U.S. at 741).

[56] Our holding that EARS acted reasonably in searching Adam does not conflict with our conclusion that his drawing did not represent a "true threat" to the school. The fact that Adam did not intentionally communicate his drawing precludes the application of the true threat analysis. Under the facts of this case, however, the discovery of the drawing on school grounds, and Adam's subsequent admission of responsibility for its ominous content, provided EARS officials with reasonable suspicion sufficient to conduct a search of Adam.

Without question, searching a student's person and his book bag is a process invasive of personal privacy, requiring justification.[57] Justification for the scope of the search was present *in* this case based on the facts supporting the initial decision to search.[58]

Because the search of Adam by EARS officials was reasonable at its inception, and was conducted in a reasonable manner when balanced against the school's

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[57] *See TLO*, 469 U.S. 337-38 ("A search of a child's person or of a closed purse or other bag *carried* on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective privacy interests.").

[58] In particular, the powerful interest of promoting school safety justified the scope of the search in this case. See *Vernonia Sch. Dist. 47J*, 515 U.S. at 661 (when assessing scope of school searches, relevant inquiry is whether the interest being protected *is* "*important enough* to justify that particular search at hand"); *Shade* v. *City of Farmington*, 309 F.3d 1054, 1059-62 (8th *Cir.* 2002) (detention and pat-down of student after school employee reported seeing student *with* a knife was reasonable, even in light of fact that the *knife* had already been turned over by another student); *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 982-83 (6th Cir. 1996) (finding that minimally invasive search of student's shoes and pockets was reasonable, even absent individualized suspicion, when school officials have independent grounds for believing that weapons had been brought to school on a particular day); *Brousseau v. Town* of *Westerly*, 11 F. Supp. 2d 177, 182 (D.R.I. 1998) (finding that searches by school officials for weapons and drugs are typically considered more compelling because the safety and welfare of students is implicated).

Additionally, intrusions on the personal privacy interests of students have been upheld based on lower indices of individualized *suspicion* than is present *in* this case. *See Cuesta*, 285 F.3d at 968-70 (arrest and strip search of student upheld as school officials had reasonable suspicion to believe that she was carrying weapons after connecting her to the distribution of a pamphlet filled with violent and racist content); *Stockton*, 147 F. Supp. 2d at 646 (finding that discovery of threatening letter on school property justified detention of a group of suspected students); *Milligan*, 226 F.3d at 654-55 (detention and questioning of students reasonable when school officials had reasonable suspicion that a fight was about to occur, even absent individualized suspicion that anyone of them had engaged in or was about to engage in criminal behavior).

interest in ensuring the safety and welfare of students, Adam's Fourth Amendment claim fails.

C

Adam's third claim alleges that he was denied his procedural due process right to a hearing before being removed from EARS. Students have a "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by...[the Due Process] Clause."[59] At a minimum, "students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing."[60]

Adam had no formal hearing before the Ascension Parish School Board before being removed from EAHS and transferred to the alternative school. But, Adam had admitted to school officials his responsibility for the drawing as well as his ownership of the box cutter. Whether a student "admitted the charges" leveled against him is "relevant in determining substantial prejudice or harm."[61]

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[59] *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

[60] Id. at 579; *Keough v. Tate County Bd. of Educ.*, 748 F.2d 1077, 1083 (5th Cir. 1984) (finding that for suspensions greater than ten days, students should be provided with a hearing, the names *of* witnesses who will be called, a summary *of* those witnesses' probable testimony, and an opportunity to present evidence in rebuttal); Sweet *v. Childs*, 507 F.2d 675, 681 (5th Cir. 1975) ("The basic requirement for notice and a hearing prior to the expulsion *of* a student from a state-supported school are outlined in Dixon: 'The notice should contain a statement *of* the specific charges and grounds which, *if* proven, would justify expulsion...The nature *of* the hearing should vary depending upon the circumstances *of* the particular case.'") (uoting Dixon *v. Alabama State Bd. of Educ.*, 294 F.2d *150*, 158 (5th Cir. 1961).

[61] *Keough*, 748 F.2d at 1083.

This is so because one of the primary purposes of expulsion hearings is that of confirming whether the student threatened with expulsion actually committed the conduct for which he is being punished. Once a student has admitted his guilt, the need for a hearing is substantially lessened.[62]

In addition to Adam's admission, his mother signed a written waiver of his right to a hearing. A parent may waive her child's due process rights to notice and a hearing prior to expulsion, provided that the waiver is made voluntarily, knowingly and intelligently.[63] In the context of school disciplinary hearings, a waiver has been considered effective when it was placed in writing after a student's parents consulted with an attorney, was signed after all potential repercussions and consequences had been rationally evaluated, and stated in several places that the student was entitled to a hearing.[64]

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[62] *See Watson v-Beckel,* 242 F .3d 1237 (10th Cir. 2001) (adopting the reasoning of *Keough* in holding that a student who was expelled without being afforded sufficient process was not prejudiced because he admitted his guilt); *Black Coalition* v. *Portland Sch. Dist. No.1,* 484 F.2d 1040, 1045 (9th Cir. 1973) (student not entitled to relief on due process claim because he "admitted all the essential facts which it is the purpose of a due process hearing to establish"): *Betts* v. *Bd. of Educ. of the City* of *Chicago,* 466 F.2d 629, 633 (7th Cir. 1972) ("As to what process *is* due, it *is* important that the plaintiff unequivocally admitted the misconduct with which she was charged. In such a circumstance, the function of procedural protections in insuring a fair and reliable determination of the retrospective factual question whether she in fact activated the false fire alarms is not essential.").

[63] *Davis Oil* Co. v. *Mills,* 873 F.2d 774, 787 (5th Cir. 1989) ("Although due process rights may be waived, a waiver of constitutional rights is not effective unless the right is intentionally and knowingly relinquished."); *Gonzalez* v. *Hidalgo County,* 489 F.2d 1043, 1046 (5th Cir. 1973) (same).

[64] *See Coplin v. Conejo Valley Unified Sch. Dist.,* 903 F. Supp. 1377, 138384 (M.D. Cal. 1995).

Mary LeBlanc signed a form waiving Adam's right to a hearing after discussing the matter with Ascension Parish School Board hearing officer Linda Lamendola. LeBlanc had been told by school officials that her son was entitled to a hearing. She was presented with a range of options and probable outcomes by Lamendola, including the option of pursuing a hearing, which Lamendola indicated had little chance of success, and the option of waiving her right to a hearing and enrolling her son immediately in the alternative school. After weighing the alternatives, LeBlanc made a rational decision to waive the hearing and enroll Adam in the alternative school. Based on this evidence in the record, Adam's contention that his mother's waiver was made involuntarily is without merit.[65]

III

Adam did not brief whether the district court erred in granting summary judgment in favor of those defendants sued in their official capacities. This issue is waived. We find that the district court properly granted summary judgment as to Adam's Fourth Amendment and Procedural Due Process claims. While we cannot agree with its finding that there was no violation of the First Amendment, we affirm its judgment on its alternative ground that Principal Braud is entitled to qualified immunity.

The judgment of the district court is AFFIRMED.

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[65] The record also contains evidence that LeBlanc was being advised by counsel at the time she signed the waiver form. However, the precise role and involvement of counsel in her waiver decision is unclear.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ADAM PORTER and
ANDREW PORTER BREEN by and through his mother and next friend, MARY LEBLANC — CIVIL ACTION

NUMBER 02-274-B-M2

VERSUS

ASCENSION PARISH SCHOOL BOARD; ROBERT CLOUTARE, Superintendent, Ascension Parish School Board, in his official capacity; CONRAD BRAUD, Principal, East Ascension High School, individually and in his official capacity; and LINDA WILSON, Principal, Galvez Middle School, individually and in his official capacity

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case requires the Court to balance the right of school officials and a school board to properly discipline, protect and educate its students against the First, Fourth, Eighth and Fourteenth Amendment protections claimed by a student. To fully understand the legal and factual issues involved, it is necessary to set forth the procedural and factual background leading up to the filing of this suit. The Court must also determine how far a federal court must and should involve itself in school disciplinary matters, particularly where the security of the students, staff and

school facilities are at issue and the education of the students in a safe environment for learning is of primary importance.

I. Background

A. Procedural Background

On March 15, 2002, Adam Porter and his brother Andrew Porter Breen, filed this suit against the Ascension Parish School *Board;* Robert Cloutare, in his official capacity as Superintendent of the Ascension Parish School Board; Conrad Braud, both individually and in his official capacity as Principal of East Ascension High School; and Linda Wilson, both individually and in her official capacity as Principal of Galvez Middle School.[66] Plaintiffs brought this suit pursuant to 42 D.S.C. § 1983 alleging their constitutional rights under the First Amendment, Fourth Amendment, Fourteenth Amendment guarantees of procedural due process and equal protection, and Eighth Amendment had been violated. Plaintiffs also alleged their rights had been violated under 20 D.S.C. § 1415. After this suit was filed defendants filed a motion for summary judgment seeking dismissal of all claims. Defendants argue plaintiffs' claims should be dismissed as a matter of fact and law. Defendants also claim that plaintiffs' claims against the school officials are precluded by qualified immunity. Finally, defendants seek an award of attorneys fees under 42 U.S.C. § 1988 for fees incurred in defending this suit.

The Court dismissed the equal protection, Eighth Amendment, and 20 U.S.C. § 1415 claims without objection.[67] Plaintiffs conceded in their supplemental brief that Andrew Breen's due process claims and any claims

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[66] Mary LeBlanc, plaintiffs' mother, filed this suit on behalf of her sons.
[67] Rec. Doc. No. 50.

against Linda Wilson, either individually or in her official capacity, were "untenable" and could be dismissed. Plaintiffs also conceded Conrad Braud was the only defendant being sued in his individual capacity.[68] Thus, the only remaining issues before this Court on defendants' motion for summary judgment are whether: (1) material issues of fact exist on Adam Porter's First and Fourth Amendment claims; (2) the evidence shows Ms. LeBlanc or Adam Porter's procedural due process rights under the Fourteenth Amendment were violated; (3) Robert Cloutare and Conrad Braud are liable under 42 U.S.C. § 1983 in their official capacities; (4) Conrad Braud is entitled to assert qualified immunity as a defense in his individual capacity; and (5) defendants are entitled to attorneys fees under 42 U.S.C. § 1988.

B. Factual Background

The facts which precede the filing of this suit are not in dispute.

When Adam was approximately 14 years old, he drew a sketch of East Ascension High School ("EAHS") in the privacy of his home. The picture showed EARS being soaked with gasoline surrounded by an individual with a torch and a missile. The drawing also depicted at least two students holding what appeared to be guns and a student throwing a brick at EARS Principal Conrad Braud, while saying the words, "shut the f--- up faggot." A racially explicative word was also written on the drawing. Adam showed the sketch to three people: Mary LeBlanc, his mother; Andrew Breen, his younger brother, and Kendall Goudeau, a friend who resided with the Porters at the time of the drawing. The sketch pad that contained the drawing

[68] Rec. Doc. No. 52 at 3.

was subsequently stored and did not resurface again until approximately two years later.

Two years after the drawing was made, Adam and Andrew were both students in the Ascension Parish school system. Adam attended EAHS and Andrew attended Galvez Middle School. On March 15, 2001, Andrew brought a sketch pad to school containing numerous drawings, including Adam's drawing of EAHS which was described above. While riding home from school on the school bus that day, Andrew allowed a fellow student to see the sketch pad. While reviewing the pad, the student discovered Adam's drawing of EAHS. The student immediately showed Adam's drawing to Diane McCauley, the bus driver and told the driver: "Miss Diane, look, they're going to blow up EAHS." McCauley immediately confiscated the sketch pad. On the following morning, McCauley took the pad to Linda Wilson, the Principal of Galvez Middle School and Myles Bourque, the in-school suspension coordinator. After the school officials saw the drawing, Andrew was called to the office and questioned by Wilson and Bourque. They also searched his book bag. In response to their questions Andrew told the school administrators that his brother Adam had drawn the sketch a few years earlier. Andrew was suspended for possessing the drawing on the school campus. Wilson and Bourque immediately brought the picture to EAHS.[69] Defendants contend Wilson felt immediate action was necessary because Andrew had been suspended from school that same year for verbally threatening to kill some of his fellow students. Although Principal Conrad Braud and Assistant Principal Gwynne Pecue were in a meeting on this particular morning, School Resource Officer Robert Rhodes interrupted the meeting to bring Adam's drawing to their attention. Adam was then summoned to the office by the EAHS officials. While being

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[69] Rec. Doc. No. 39 at 4.

questioned, Adam readily admitted he had drawn the picture. During the meeting, Adam and his book bag were searched. The search revealed notebooks from Adam's book bag that contained references to death, drugs, and sex; gang signals etched on the notebooks; a fake ID; and a razor blade, which can also be described as a box cutter. Plaintiffs set forth several explanations for the items found during the search. Although plaintiffs concede Adam did have the materials found on his person or book bags, they contend the death references were part of a homework assignment. They also claim the gang symbols only referred to a group of young men that Adam hung around with who Braud did not consider a threat. Finally, plaintiffs state the "razor blade" was allegedly a box cutter used by Adam in his after school job.[70] Following the search and interview, Braud recommended that Adam be expelled from EAHS and sent to an alternative school. Officer Rhodes read Adam his Miranda rights and arrested him on charges of terrorizing and illegal possession of a weapon. Adam's mother, Mary LeBlanc, was called and asked to come to the school. When she arrived, she was told that Adam was being recommended for expulsion and that he also had been arrested. Adam and his mother were allowed to leave the school carrying the written recommendation for expulsion and instructions that Adam was to remain at home until a hearing could be held. No hearing date was immediately set. On March 23, 2001, Ms. LeBlanc voluntarily signed a form waiving Adam's right to an expulsion hearing before the superintendent. Ms. LeBlanc signed the waiver form after discussing the matter with Linda Lamendola, the hearing officer for the Ascension Parish School Board. During the meeting, Adam's mother was advised that these expulsion hearings were regularly decided in the school's favor, and Adam could enroll at the Ascension Parish

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[70] Rec. Doc. No. 43 at 3.

Alternative School and continue his education if she waived the hearing. Following the meeting, Adam enrolled in the Ascension Parish Alternative School. The defendants also allowed Adam to re-enroll at EARS in August 2001. He voluntarily dropped out of EARS in March 2002.

II. Law and Analysis

A. Standard for Summary Judgment

Summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[71] The Supreme Court has interpreted Rule 56(c) to mandate lithe entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[72]

If the moving party meets this burden, Rule 56 (c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial.[73] The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt

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[71] Fed R. Civ. P. 56 (c); *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 408-09 (5th Cir. 2002); *New York Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 338 (5th Cir. 1996); and *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996).

[72] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *see also Gunaca v. Texas*, 65 F.3d 467, 469 (5th Cir. 1995).

[73] *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1046-47 (5th Cir. 1996).

as to the facts, or a scintilla of evidence.[74] Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts."[75] The substantive law dictates which facts are material.[76] The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[77] Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial.[78]

B. Constitutional Claims

The Court now turns to a discussion of the various constitutional claims asserted by the plaintiffs and the defenses raised by the defendants.

1. First Amendment

The United States Supreme Court has issued a series of opinions which set forth guidelines the Court and others must follow in regulating student expression in public schools. These cases include *Tinker v. Des Moines Indep. Community School Dist.*,[79] *Bethel School District No.* 403 *v.*

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[74] Little *Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); and Wallace, *supra* at 1047.

[75] *Wallace, supra* at 1048 (citations omitted); *see also S.W.S.* Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996).

[76] *Canady* v. *Bossier Parish School Bd.*, 240 F.3d 437, 439 (5th Cir. 2001).

[77] *McCallum Highlands, Ltd.* v. *Washington Capital* Dus, Inc., 66 F.3d 89, 92 (5th Cir.1995) , as *revised on denial of rehearing*, 70 F.3d 26 (5th Cir.1995).

[78] *Anderson* v. *Liberty Lobby,* Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (". . .there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.") .

[79] 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969).

Fraser,[80] and *Hazelwood School District v. Kuhlmeier*.[81] In *Tinker*,[82] the United States Supreme Court found that public school students do not shed their constitutional rights "at the schoolhouse gate,"[83] and held that a public school's refusal to allow its students to wear black armbands to protest the Vietnam War was an unconstitutional denial of the students' First Amendment rights.[84] Because the restrictions and limitations set forth in *Tinker* regulated political content, the level of scrutiny required by the Court was high. The Court noted that unless the challenged expression materially and substantially interfered with the requirements of appropriate discipline in the operation of the school, First Amendment protection should be accorded to students.[85] A material and substantial interference may only be shown by facts which reasonably lead school officials to forecast substantial disruption of or a material interference with school activities.[86] The Supreme Court then decided the *Fraser*[87] case wherein the Court held that the First Amendment did not protect a student's vulgar and sexually provocative speech at a school assembly. The Court found that a student's First Amendment rights "are not coextensive with the rights of adults in other settings."[88] The distinction set forth by the Court in *Fraser* was that the

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[80] 478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986)

[81] 484 U.S. 260, 108 S. Ct. 562, 98 L.Ed.2d 592 (1988).

[82] *Tinker*, supra.

[83] *Id.* at 506, 736.

[84] *Id.* at 514, 740.

[85] *Id.* at 509, 738 ("Certainly where there is no finding and no showing that engaging in the conduct would 'materially andsubstantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.") (citation omitted).

[86] *Id.* at 514, 740. *See also Shanley* v. *Northeast Independent School Dist.*, 462 F.2d 960, 970 (5th Cir. 1972).

[87] Fraser, supra.

[88] *Id.* at 682, 3164.

expression in *Fraser* was unrelated to any political viewpoint. Thus, the Court found the expression was entitled to lesser constitutional scrutiny than the *Tinker* plaintiffs received. Finally, in *Kuhlmeier*,[89] the Court held that school newspaper articles dealing with controversial topics may be censored by school officials. The Court found that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts."[90] *Kuhlmeier* differed *from Tinker* in that the challenged expression came *from* a school sponsored publication and justified a lower standard *for* upholding student expression than the standard applied in *Tinker*.

In the case now pending before the Court, this Court must determine whether First Amendment protection should be given to a student who brings a graphic and violent drawing to school that depicts a public school being soaked with gasoline, while a missile is aimed at it, with obscene and racial expletives written on the drawing, and students holding guns and throwing a brick at the principal. In determining whether this drawing is entitled to the First Amendment protections claimed by the plaintiff, it is necessary to review certain events which preceded the defendants' actions. Prior to and during the period involved, school officials, students and parents '.were exposed to horrific news stories depicting students who went on shooting rampages and committed other acts of violence on school campuses. The most notable story was the attack at Columbine High School in April 1999, where a tragic shooting occurred resulting in many deaths and injuries. Many news organizations reported the large number of guns and other violent weapons being brought to school and the other acts of violence and disruptions in schools

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[89] *Kuhlmeier*, supra.

[90] Id. at 267, 567-68.

around the country. Similar acts were reported on school buses. Some schools became like war zones, and metal detectors and police officers became commonplace on high school campuses throughout the United States. Parents were justifiably concerned about the safety of their children at school and on school buses. School officials were trying to maintain an environment for students to learn while also implementing appropriate security measures. Plaintiffs have argued throughout their briefs that this Court should not consider Columbine and other similar incidents in determining the reasonableness of Ascension Parish school officials' behavior. However, school officials cannot operate in a vacuum or in a fantasy world and must be aware of the events occurring at other schools to properly protect their students and faculty. One of the keys to avoiding violence and disruption at schools is to be aware of acts which could cause such. Indeed, several of the opinions this Court relies on in this opinion mention Columbine and similar incidents in upholding the actions taken by the schools in other cases. A clear example of this is the opinion rendered in *Lavine* v. *Blaine School Dist.*,[91] wherein the Court stated:

> "[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis. The recent spate of school shootings have put our nation on edge and have focused attention on what school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies. After Columbine, Thurston, Santeeand other school shootings, questions have been asked about how many teachers or administrators could have missed telltale 'warning signs,' why something was not

[91] 257 F.3d 981 (9th Cir. 2001)

> done earlier and what should be done to prevent such tragedies from happening again."[92]

It is against this backdrop that this Court must now decide if Adam Porter's drawing is entitled to First Amendment protection.

In resolving the First Amendment claim, this Court must first decide the standard that should be applied under the facts of this case in making this determination. The Court has several options available in determining if Adam's drawing constitutes student speech which is entitled to First Amendment protection. The Court may use the *Tinker* standard and determine if the speech "materially and substantially interferes with the requirements of appropriate discipline in the operation of [public schools]."[93] A second approach would permit the Court to determine if the speech constitutes a "true threat" and is precluded from any First Amendment protection at all.[94] The third approach is to follow a standard established by the Fifth Circuit Court of Appeals which rejects applying *Tinker* to viewpoint neutral speech that just happens to occur on campus. The Court will briefly discuss each of these standards.

The Ninth Circuit's decision in *LaVine*[95] illustrates the pure- *Tinker* approach. In *LaVine,* a high school student showed a poem that he had written to his teacher. The poem was a story about a student killing himself after being unable to deal with the fact he had killed his fellow classmates two years earlier. The poem, which had been written at home and was not a school assignment, disturbed

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[92] Id. at 987.

[93] *Tinker, supra* at 509, 738.

[94] *See Watts v. United States,* 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

[95] *LaVine, supra.*

the teacher because this particular student had prior behavioral problems. Therefore, the teacher took the poem to the principal. Thereafter, the student was expelled.[96] The student and his father then filed suit in federal court claiming the student's constitutional rights, including those under the First Amendment, had been violated. The Ninth Circuit affirmed the district court's decision which granted a partial summary judgment on the First Amendment claims.[97]

In dismissing some of the First Amendment claims, the Ninth Circuit applied the standard set forth in *Tinker* because the speech in question was neither lewd and offensive or school sponsored. Under this approach, which the Court will refer to as the pure- *Tinker* approach, *Tinker* is used on any First Amendment claim in which Fraser or *Kuhlmeier* is not implicated. Using this standard, the Ninth Circuit held the student's poem would not be entitled to First Amendment protection if the school could justify its decision by showing facts that might reasonably lead school authorities to forecast a substantial disruption of or material interference with school activities.[98] The Court then found it would have been reasonable for school officials to forecast a substantial disruption based on the totality of the facts - the student's past behavioral problems and suicidal tendencies/ the violent imagery of the poem the special circumstances of the school environment/ and the recent school shootings in the news.[99]

The decision rendered in *Demers v. Leominster School Dept.*[100] illustrates the second approach. In *Demers/* an eighth grade student with a history of disruptive behavior and

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[96] *Id.* at 984-85.

[97] *Id.* at 986.

[98] *Id.* at 989.

[99] *Id.* at 989-90.

[100] 263 F.Supp.2d 195 (D.Mass. 2003).

substance abuse was expelled for drawing two pictures during school - one of the school surrounded by explosives, with students hanging out of the window crying for help and the other of the Superintendent of Schools with a gun pointed at his head and explosives at his feet. The student had also written on a separate sheet of paper that he wanted to die and hated life.[101] In determining if the drawings were entitled to First Amendment protection, the district court followed *LaVine,* but first used *Tinker* as the default standard. Under the *Tinker* standard, the Court held the drawings could reasonably be interpreted as a potential disruption or interference with public schools, and First Amendment protection was precluded.[102] However, the Court also applied the traditional "true threat" standard enumerated in *Watts v. United States.*[103] The Court found that the true threat inquiry was necessary because if a reasonable person would interpret the alleged threat as a serious expression of an intent to cause a present or future harm, then the speech would not be entitled to First Amendment protection. The Court concluded the expression would constitute a threat, not speech.[104] The Court also found this student's drawing was not entitled to First Amendment protection under the true threat doctrine because his drawing and note would have reasonably been considered a threat to both the school and himself.[105]

The final approach that can be used in these First Amendment cases comes from the Fifth Circuit's decision in *Canady v. Bossier Parish School Bd.*[106] In *Canady,* the Court had to determine what level of scrutiny to apply to a First

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[101] *Demers, supra* at 198-99.

[102] *Id.* at 203.

[103] *Watts, supra.*

[104] *Demers, supra* at 201-02.

[105] *Id.* at 202.

[106] *Canady, supra.*

Amendment attack on a compulsory public school uniform policy. The Fifth Circuit rejected *Tinker* as being the default standard whenever challenged student speech is not lewd and offensive or school sponsored. Instead, the Fifth Circuit said that the level of scrutiny applied to regulate student expression depends on the substance of the message, the purpose of the regulation, and the manner in which the message is conveyed.[107] The Court identified three categories of student speech regulations: (1) school regulations which are governed by *Tinker;* (2) lewd, vulgar, obscene, or plainly offensive speech which is governed by Fraser; and (3) expression related to school sponsored activities which is governed by *Kuhlmeier.*[108] The Fifth Circuit then acknowledged the views of the Seventh, Eighth and Ninth Circuits that the *Tinker* standard should be the default standard whenever the challenged speech does not fall into any of these particular categories. However, the *Canady* court declined to apply such a standard and held the *Tinker* standard "[did] not account for regulations that are completely viewpoint -neutral."[109] The Fifth Circuit held that when the expression was viewpoint-neutral personal expression that just happened to occur on campus, the applicable level of scrutiny was higher than *Kuhlmeier,* but less stringent than the school official's burden in *Tinker.* Where none of the traditional categories applied, the Fifth Circuit said the more appropriate standard was to combine the traditional time, place, and manner analysis with the test enumerated in *United States v. O'Brien.*[110] Under this approach, whenever student expression is viewpoint neutral speech that just happens to occur on campus, the school's reaction will pass constitutional scrutiny "if it furthers an

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[107] *Id.* at 441.

[108] *Id.* at 442.

[109] *Id.* at 443.

[110] 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) .

important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."[111]

Neither the Supreme Court nor the Fifth Circuit have specifically addressed whether drawings such as that drawn by Adam in this case are entitled to First Amendment protection. Therefore, the Court will use all three of the standards set forth above to determine if Adam's drawing is entitled to First Amendment protection. It can hardly be said that Adam's drawing was a political expression which is protected by the First Amendment. Thus, Adam's drawing is not entitled to First Amendment protection under a *pure-Tinker* standard. Therefore, the Court finds that the drawing "materially and substantially interferes with the requirements of appropriate discipline in the operation of [public schools].[112] There were also specific facts available that made it reasonable and indeed prudent for school officials to forecast a substantial disruption or material interference with school activities considering the nature of the drawing and similar events at other schools that had resulted in tragic outcomes or disrupted the educational environment at schools. In fact, the drawing did cause a substantial disruption at two schools in Ascension Parish. Authorities at Galvez Middle School had to handle a disruption on Diane McCauley's school bus because a young girl had yelled EAHS was going to be burned down. This disruption continued at the school when Andrew Breen was called into the office and administrators had to suspend him. The school officials were justified and showed sound judgment for being concerned for the safety of the students, staff and school property. These facts clearly support the

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[111] *Canady, supra* at 443.

[112] *Tinker, supra* at 509, 738.

school's decision to search Andrew's school book bag. There were also disruptions and potential dangers at EAHS because of the discovery of the drawing. Officials interrupted a meeting of EAHS administrators because they believed immediate action was necessary to decide how to handle the problems associated with Adam's drawing. The administrators held a meeting with Adam and his mother. It is also clear that Adam's mother knowingly and voluntarily waived a formal hearing. School officials also examined the drawing and conducted a search of Adam and his locker to protect the staff, students, faculty and facilities at EAHS. This search turned up a box cutter which was found in Adam's wallet. After considering all of the factors a reasonable school official would and should consider under the circumstances, the administrators decided to expel Adam from EAHS and place him in an alternative school. The concerns of the Ascension Parish school officials and their subsequent actions are analogous to the actions taken by the administrators in *LaVine* and *Demers* where both Courts found that no First Amendment violations had occurred. After reviewing the facts and circumstances of this case and the jurisprudence, this Court concludes that no First Amendment protection is or should be available to plaintiffs under a *pure-Tinker* standard.

Using the factors set forth in *Watts,*[113] this Court must determine if Adam's drawing constituted a "true threat" to the faculty, students and facilities at EAHS. Threats of violence are types of speech that the government can proscribe without offending the First Amendment because the government has an overriding interest and indeed an obligation to protect individuals from the fear that such violence may occur.[114] In the briefs submitted to

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[113] *Watts, supra.*

[114] *Watts, supra* at 707, 1401; *R.A.V. v. City of St. Paul, Minnesota,* 505 U.S. 377, 388; 112 S.Ct. 2545; 120 L.Ed.2d 305(1992); *Shackelford v. Shirley,* 948 F.2d 935, 938 (5th Cir. 1991).

the Court, both parties discussed *Doe v. Pulaski County Special School Dist.*,[115] an Eighth Circuit case that discussed the true threat doctrine in the context of public schools. In Doe, a junior-high student wrote two violent and obscenity-laden rap songs in which he expressed a desire to molest, rape, and murder his ex-girlfriend. The songs were prepared at the student's home, and he later showed them to one of his friends. The student had also discussed the contents of the song with his ex-girlfriend. The friend removed the songs from the student's room without the student's permission and delivered them to the ex-girlfriend. The songs were turned over to school authorities who then expelled the student.[116] In determining whether the songs constituted a true threat, the Eighth Circuit held the songs to the standard of whether a reasonable recipient would have interpreted the speech as a serious expression of an intent to harm or cause injury to another.[117] The Court set forth a nonexhaustive list of factors which are relevant for the Court to consider in determining whether a reasonable recipient would have viewed the purported threat: (1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the alleged threat communicated it directly to the object of the threat; (4) whether the speaker had a history of making threats against the person purportedly threatened; and (5) whether the recipient had a reason to believe the speaker had a propensity to engage in violence.[118] Applying the above standard, the Eighth Circuit found the student's drawing was not entitled to First Amendment protection because it was a true threat. The factors the Court found and relied on were that the student willingly showed the letter

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[115] 306 F.3d 616 (8th Cir. 2002).

[116] *Id.* at 619-20.

[117] *Id.* at 624.

[118] *Id.* at 623.

to his friend and discussed its contents with the ex-girlfriend; both the friend and ex-girlfriend were extremely frightened by the contents of the letter; and the student had a past history of violence.[119] Viewing the entire factual circumstances surrounding Adam's drawing, it was reasonable, and in this Court's opinion necessary and proper, for Ascension Parish school officials to view Adam's drawing as a true threat to the EAHS school students, faculty and facilities. A careful review of the drawing and language contained on the drawing reveals that it was reasonable for the recipients of Adam's drawing to interpret it as a serious expression of an intent to harm and cause injury or even death to others or to cause damage to the school's facilities. The drawing resulted in serious expressions of fear and concern by its recipients which included both students, administrators and a bus driver. Administrators at Galvez Middle School and EAHS said they were seriously concerned for the welfare of their other students. They were justified in having this concern. The seriousness of the threat is illustrated by the immediate response school officials from two different schools gave to Adam's drawing. Further, both Adam's and Andrew's past disciplinary records made it reasonable for school officials to believe a serious situation did exist and both students were capable of carrying out the threats depicted on the drawing. It is of no consequence that Adam may not have intended for the drawing to end up in the school administrator's hands or a student's hands. The fact that a box cutter was found in Adam's wallet only adds further support for the action taken by the school administrators. The Court believes the school administrators were justified in treating the box cutter as a dangerous weapon.[120]

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[119] *Id.* at 625-27.

[120] The Court cannot overlook the fact that box cutters were used by the terrorists who hijacked the planes that crashed into the World Trade

Plaintiffs seek to distinguish this case from Doe by arguing that Adam did not intentionally disclose his drawing to anyone else. This does not and should not matter. What does matter is that the drawing did end up in the hands of a student, a bus driver and school administrators, all of whom were justified in believing it was a threat to the safety of all of the EAHS school family and facilities.[121] It is totally unreasonable for Adam, his brother and his mother to believe that this drawing would not cause the school administrators and students to react as they did. The Eighth Circuit made it clear in *Pulaski* that the factors set forth in that opinion were nonexhaustive. However, the factors set forth in *Pulaski* and those found by the Court to be present in this case support a finding that the recipients of Adam's drawing reasonably perceived it as a threat and were justified in concluding that Adam and his brother were capable of carrying out the threat. Therefore, the Court concludes that Adam's drawing was a true threat of an intent to harm or cause injury to others or school property and is not entitled to First Amendment protection.

Under the Fifth Circuit approach, this Court must now determine (1) whether the school's suppression of Adam's speech furthers an important or substantial government interest; (2) the interest is unrelated to the suppression of student expression, and, (3) the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest.[122] In *Canady*, the Fifth Circuit upheld a mandatory school uniform policy because the government's interest in improving the educational process outweighed the students' First Amendment interest.

Center, the Pentagon and in a field in Pennsylvania on September 11, 2001.

[121] Both of the schools involved in this case should be grateful for the action taken by the student and bus driver who had the courage to report the nature of the drawing to school officials.

[122] *Canady, supra* at 443.

The Court said that school uniform policies had been shown to decrease discipline problems and improve test scores.[123] The Court further justified its deference to school officials relying on Supreme Court precedent which holds that it is not the job of federal courts to determine the most effective way to educate our nation's youth.[124] In Adam's case, the school's interest is even greater. The safety of the children who attend our schools is one of the most important responsibilities that school officials have. Even the best planned educational process will fail if school administrators cannot ensure the safety of its students and facilities. Further, this responsibility is even greater today because of the horrific shooting incidents and other acts of violence which have occurred at schools in the United States and elsewhere in recent times. Since the Fifth Circuit has upheld a school uniform policy against a First Amendment attack, this Court has strong belief that drawings like Adam's should not receive First Amendment protection under the facts of this case. For school officials to ignore the potential or actual danger exhibited by the facts surrounding Adam's drawing and subsequent search would have been a gross violation of a duty school administrators have to protect their students and facilities. Where as here, there are facts which fully support the actions of the school administrators, the federal courts should not second guess school officials and interfere with the role of the administrators to properly discipline, protect and educate students.

Finally, plaintiffs have repeatedly argued that because Adam's drawing was done in the privacy of his own home, it is off-campus expression that school officials have no right to regulate. This contention is totally without merit. The Court has little doubt that bringing a gun from

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[123] *Id.*

[124] *Id.* at 444 citing *Kuhlmeier, supra.*

home and using it as a threat at school would not be sanctioned because the gun was loaded at home. The same can be said of the drawing. The key issue is whether the school administrators and students perceived the drawing (or gun) as a threat to their safety and security when it was discovered on the school campus or bus. The speech in *Doe* and *LaVine* were both conducted off-campus, but these Courts still approved the regulation because the drawings ultimately ended up in the hands of school administrators. The action taken in *Doe* was approved where the songs ended up with school officials even though the student clearly had no intent for his songs to leave his room or ever be seen by others. Adam's intent is also immaterial. It is material that his drawing ended up on a school bus and caused a danger and threat to school property, students and faculty or otherwise disrupted the education of students at two schools. Where off-campus expression leads to an interference and disruption of on-campus activities, as was done in this case, this Court cannot and should not afford such expression First Amendment protection or second-guess the action school officials take to protect their students and facilities. Indeed, the Court should give full support and approval to the actions of school administrators who take appropriate action, as was done in this case, to protect and educate their students in a disciplined environment that is safe and conducive for learning.

2. Fourth Amendment

The Court now turns to a discussion of plaintiffs' Fourth Amendment claims. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures."[125] In Fourth Amendment cases, courts must determine whether a search or seizure is reasonable under all the facts and circumstances of a particular governmental invasion of a person's personal security.[126] In *New Jersey v. T.L.O.*,[127] the United States Supreme Court held the Fourth
Amendment's prohibition on unreasonable searches and seizures does apply to searches conducted by public school officials.[128] The standard required when a public school official wants to search the person of a student is reasonableness under the circumstances and not probable cause. Reasonableness in the public school setting is determined by balancing the student's legitimate expectation of privacy against the school's legitimate need to maintain an environment in which learning can take place.[129] When defining this balancing exercise, the Supreme Court realized the extreme importance of maintaining order in the public school setting, stating:

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of

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[125] *Milligan v. City of Slidell*, 226 F.3d 652, 654 (5th Cir. 2000) (citing *Terry v. Ohio*, 392 U.S. 1, 88S.Ct. 1868, 20 L.Ed.2d 889 (1968) and U.S. Const., amend. IV).

[126] *Milligan, supra* at 654.

[127] 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

[128] *Id.* at 333, 738.

[129] *Id.* at 340, 742.

> order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.[130]

Determining the reasonableness of a school official's actions involves a two-part inquiry: (1) whether the action was justified at its inception; and (2) whether the actual search was reasonably related in scope to the interference that justified the interference in the first place. A search is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or a school rule.[131]

The Supreme Court also addressed Fourth Amendment issues in the public school context in *Vernonia School Dist. 47J v. Acton,*[132] which upheld a mandatory drug testing policy for high school athletes. Justice Scalia, writing for the Court, recognized the important interest of maintaining order in public schools and reasoned the public school setting contained "special needs" that justified lessening traditional Fourth Amendment requirements.[133] Because these special needs existed, the Supreme Court held that "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children," and thus, "students within the school environment have a lesser expectation of privacy than members of the population generally."[134]

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[130] *Id.* at 339, 741.

[131] *Id.* at 341-42, 742-43.

[132] 515 U.S. 644, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)

[133] *Id.* at 653, 2391.

[134] *Id.* at 656-57, 2392.

Courts applying these Supreme Court cases often defer to the school's decision in Fourth Amendment cases. In *T.L.O.*, the Supreme Court held reasonable suspicion existed to search a student's purse, its inner compartments, and to read two letters and index card that revealed the student's drug-dealing habits whenever the student had been caught smoking in the bathroom.[135] Similarly, in *Hassan v. Lubbock Independent School Dist.*,[136] the Fifth Circuit granted summary judgment on a student's Fourth Amendment claim where the student had been detained on a school field trip to a prison for failure to behave.[137] Citing *T.L.O.* and "the unique backdrop that schools present for the operation of the Fourth Amendment," the Court said "the reasonableness of seizures must be determined in light of all circumstances, with particular attention being paid to whether the seizure was justified at its inception and reasonable in scope."[138] Finally, in *Milligan* v. *City of Slidell*, 74 administrators at Slidell High School and police officers called students from class to question them about rumors that a possible fight on school premises was going to occur. Some of the students filed suit against the city arguing their Fourth Amendment rights had been violated.[139] The Fifth Circuit reversed the decision of the Eastern District of Louisiana which had ruled in the students' favor. 76 Citing *Vernonia*, the Fifth Circuit held that the school's compelling governmental interest outweighed the students' Fourth Amendment rights. The Court characterized this compelling government interest as including student protection, fostering self-discipline, and the deterrence of possible violent misconduct. The Court also noted a temporal

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[135] *T.L.O., supra* at 328, 347, 735-36, 746.

[136] 55 F.3d 1075 (5th Cir. 1995)

[137] *Id.* at 1082.

[138] *Id.* at 1079.

[139] *Milligan, supra.*

concern and considered whether immediate response was necessary and warranted. The Court found the school's response was indeed needed due to the imminent threat of an on-campus disturbance.[140] In addition to the cases set forth above, the parties have discussed two additional cases in their briefs. In *Cuesta v. School Ed. of Miami-Dade County, Fla.,*[141] nine high school students created and distributed an anonymous pamphlet on school grounds which featured a graphic picture of the school principal with a dart through his head. The pamphlet also contained an essay that "wondered what would happen if he shot the principal."[142] In response, the principal called the students to his office and had them arrested. The students were later booked and strip-searched at a correctional facility.[143] The court held the students' Fourth Amendment rights were not violated by the school board or the police officers because "reasonable suspicion" existed based on the "violent and threatening language and imagery contained in the pamphlet."[144] The Eleventh Circuit concluded that violent drawings accompanied by threatening words aimed at the school is sufficient to create reasonable suspicion that the student may intend to harm the school. Thus, the court found that a search under such circumstances was deemed reasonable under the Fourth Amendment.

A similar result was reached in *Stockton* v. *City of Freeport,* Texas.[145] In *Stockton,* a threatening letter was found in a high school computer *room* three days after the Columbine incident. The school did not know who wrote the letter, but suspected it was one of several students who

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[140] *Id.* at 655.

[141] 285 F.3d 962 (11th Cir. 2002).

[142] *Id.* at 965.

[143] *Id.* at 965-66.

[144] *Id.* at 969.

[145] 147 F.Supp.2d 642 (S.D. Tex. 2001).

congregated at a group of picnic tables on campus.[146] In response, fourteen students were frisked, handcuffed and led from school to the municipal building.[147] Later, the students were exonerated of all charges by the school principal in front of the student body.[148] The students then filed suit against the school for violating their Fourth Amendment rights. The Court granted the school's motion to dismiss because "the rights asserted by [the students], although legitimate and substantial, [did] not outweigh the School's dramatically compelling interests in maintaining a safe place of learning."[149] Thus, the *Stockton* Court, like *Milligan,* considered the temporal factor and concluded an immediate response in this situation was both crucial and warranted.[150]

Under these cases, the reasonableness of the actions taken by school officials in the public school setting is usually resolved in favor of the school. When school personnel or students are threatened by a student's expression, the deference given school officials in the Fourth Amendment context is even greater. Plaintiffs have not submitted any evidence to convince this Court that it should depart from the holdings of these cases. Defendants acted properly and reasonably in searching Adam under the facts of this case. His drawing graphically illustrated what EAHS would look like if it were under siege. The profane language further indicated that this student was not pleased with

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[146] *Id.*at 644.

[147] *Id.* at 643.

[148] *Id.* at 644.

[149] *Id.* at 647. "It is difficult to conceive of a scenario in which greater governmental interest is invoked than the threat of indiscriminate violence at school. Indeed, officials in the Columbine massacre were harshly criticized for failing to take action regarding prior signs of problems." Id. at 646.

[150] *Id.*

EAHS and its principal had a distinct racial bias against some of its students. Ascension Parish school officials (and the student and bus driver who discovered the drawing) were totally reasonable in believing that Adam posed an immediate danger to the faculty, students and facilities of EAHS. The search of Adam's person and book bag was necessary, justified, and clearly permitted under the cases cited above. The facts submitted with the motion for summary judgment clearly support a finding of reasonableness. Thus, defendants are entitled to summary judgment as a matter of law on plaintiff's Fourth Amendment claims under the undisputed facts of this case. The Court's decision is fully supported by the Fifth Circuit 's decision in *Milligan* wherein the Court stated:

> [I]t should be clear that the privacy right asserted does not outweigh the school's interests. Students in the school environment have a lesser expectation of privacy than the general population. Teachers and administrators control their movements from the moment they arrive at school; for example, students cannot simply walk out of a classroom. Nor can they walk out of a principal's or vice-principal's office in the middle of any official conference. Students at school thus have a significantly lesser expectation in regard to the temporary "seizure" of their persons than does the general population.[151]

3. Procedural Due Process

The plaintiffs have also asserted a due process claim. The Due Process Clause prohibits the state from depriving a

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[151] *Milligan, supra* at 655-56.

person of life, liberty, or property without due process of law. In any procedural due process claim, the initial inquiry should always be whether a property interest or right exists.[152] In *Goss v. Lopez,* [153] the United States Supreme Court held that students have a protected property interest in education that required minimum due process protections before disciplinary sanctions could be imposed.[154] Thus, Adam had a protected property interest in his education, which means he could not have been expelled without due process of law. The extent of due process required is also a relevant factor that must be resolved by the Court. In Goss, the Court held students facing a ten-day suspension must be given some kind of notice and afforded some type of hearing.[155] The Court stated the hearing could be held immediately following the incident and be informal. However, the Supreme Court did caution "suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[156] Considering these guidelines, Adam was entitled to a hearing since he was removed from EAHS and sent to an alternative school. The nature of and the extent of the due process hearing afforded Adam is not an issue on this summary judgment motion under the facts of this case. Instead, this Court must determine whether Adam was entitled to any due process hearing at all since he freely and voluntarily admitted the charges against him and his mother knowingly and voluntarily waived Adam's right to an expulsion hearing.

To establish a denial of procedural due process, a student must show substantial prejudice from an

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[152] *See Board* of *Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972) .

[153] 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

[154] *Id.* at 573, 736.

[155] *Id* . at 579, 738.

[156] *Id.* at 584, 742.

inadequate procedure.[157] In *Keough v. Tate County Bd. of Educ.*[158] the Fifth Circuit held where a student admitted the charges against him and was suspended, such an admission of guilt and truth of the charges precluded a procedural due process claim, even if a due process violation had in fact occurred.[159] The Court reasoned that since the student had admitted he committed the charged conduct and had knowledge that his conduct violated school rules, there was substantial evidence to support a finding that the student was guilty. Thus, no procedural due process violation had occurred.[160]

Other circuits follow the Fifth Circuit rule and have also held there is no procedural due process violation when the student admits the violation. In *Watson* ex *rel. Watson v. Beckel,*[161] the Tenth Circuit concluded that where a military student admitted he assaulted his roommate and was expelled, the student's claim for procedural due process due to lack of notice failed because additional notice would not have allowed him to better defend his claim.[162] In *Black Coalition v. Portland School Dist. No.* 1,[163] the Ninth Circuit found certain portions of a school district's disciplinary grounds unconstitutional on procedural due process grounds. However, the Court declined to order a new hearing because the student had "admitted all of the essential facts which it is the purpose of a due process hearing to establish."[164] Similarly, in *Betts* v. *Bd.* of *Educ.* of

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[157] *Keough* v. Tate *County* Ed. *of* Educ., 748 F.2d 1077, 1083 5th Cir. 1984) *citing U.S. Pipe & Foundry* v. Webb, 595 F.2d 264, 274 (5th Cir. 1979) and *Arthur* Murray Studio *of Washington, Inc.*

[158] *Keough, supra*

[159] *Id.* at 1083

[160] *Id.*

[161] 242 F.3d 1237 (10th Cir. 2001).

[162] *Id.* at 1242.

[163] 484 F.2d 1040 (9th Cir. 1973).

[164] Id. at 1045.

the City of Chicago,[165] the Seventh Circuit held that where the student unequivocally admitted to activating false fire alarms, the "function of procedural protections in insuring a fair and reliable determination of the retrospective factual question...is not essential."[166] The Court acknowledged that while a further process hearing may be required under certain circumstances in the penalty phase even when the offense is admitted, the meeting held between the parents and school administrators was sufficient to satisfy this requirement.[167] Finally, in *Farrell* v. Joel,[168] the Second Circuit held a suspension hearing was not entitled to a procedural due process claim where the student admitted the conduct and knowledge of the violation.[169] Federal district courts have followed the precedent set by the circuit courts and held that procedural due process violations do not occur when the student admits the conduct that led to the sanction.[170]

Following the precedents set forth above, it is clear that procedural due process requirements are less stringent when the student admits the conduct which forms the basis for imposing a sanction on the student. Plaintiffs argue Adam admitted he drew the picture, but did not admit to doing anything wrong. Such an argument is totally frivolous and nothing more than an exercise in semantics. Not only

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[165] 466 F.2d 629 (7th Cir. 1972).

[166] *Id.* at 633.

[167] *Id.* at 631, 633.

[168] 437 F.2d 160 (2nd Cir. 1971).

[169] *Id.* at 163.

[170] *See Hill v. Rankin County,* Miss. *School* Dist., 843 F.Supp. 1112, 1118-19 (S.D. Miss. 1993) (Cited *Keough* to conclude that where student admitted the violation, an indefinite suspension was not the result *of* a procedural due process violation.); and *Watson, supra* at 1242 *citing, inter alia, Boster v. Philpot,* 645 F.Supp. 798, 804 (D.Kan. 1986) ("even *if* procedure was inadequate, 'the students would still be unable to show that they suffered any prejudice so as to establish a denial of due process. By admitting their guilt, the plaintiffs waived their right to a hearing.'").

should the subject matter of the drawing put a student such as plaintiff on notice that this was a clear violation of student rules and could cause fear among the faculty and students, but it could also interrupt and impede the school's educational process. However, the drawing was not the only violation found. Adam also had an illegal weapon in his wallet which is also a violation of school rules. The subject matter of the drawing combined with the discovery of a weapon on the person of the student and his admission in the presence of his mother eliminate any need for a more detailed hearing than plaintiff received at the conference which was held in this case. The Court also cannot overlook the fact that it has already held the drawing was not protected by the First Amendment. Considering the jurisprudence and the undisputed facts of this case, including Adam's admission, the discovery of the box cutter and the mother's voluntary waiver of a hearing, plaintiffs were afforded adequate procedural due process. Therefore, summary judgment should be granted on the procedural due process claim.

The Court will also determine whether Adam was denied due process by the Ascension Parish School Board because his mother waived the hearing on Adam's behalf. In *Coplin* v. *Conejo Valley Unified School Dist.*,[171] the Court held the procedural due process requirements for a student who was expelled for sexual harassment were satisfied where his parents had waived the right to a hearing.[172] The Court relied on the standard set forth by the United States Supreme Court in *D.H. Overmyer Co.* v. *Frick* Co.[173] and concluded that parents may waive their child's constitutional procedural due process right if it is established by clear and convincing evidence that the

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[171] 903 F.Supp. 1377 (C.D.Cal. 1995).

[172] *Id.* at 1385.

[173] 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972).

waiver is voluntary, and knowing and intelligent.[174] The *Coplin* Court found the student's parents' waiver was voluntary, knowing, intelligent, and non-coercive because it was based on "a rational decision to sign the Consent to Discipline Form after evaluating the potential repercussions of not doing so."[175] These repercussions would have included "more serious and adverse consequences" such as their son not being able to graduate with his classmates or having to pay private school tuition.[176]

This Court adopts the persuasive and well reasoned analysis in *Coplin* to support its conclusion that Adam's mother's decision to waive the hearing on his behalf was "voluntary, knowing, intelligent, and non-coercive."[177] The waiver signed by Adam's mother contained language that clearly advised her that Adam had a right to a hearing. Thus, the language which preceded her signature stated:

> I understand that although I have a right to a hearing I choose at this time to allow my son/daughter to be transferred to the Ascension Parish Alternative School.[178]

Further, there is no evidence that Adam's mother was misled by Linda Lamendola when she signed the waiver. Thus, Ms. LeBlanc testified in her deposition as follows:

> Q. But you understand, though that you waived your right to contest the expulsion.
> A. Right.

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[174] Coplin, supra at 1383-84 citing D.H. Overmyer, supra at 185, 187.

[175] *Id.* at 1384. The Court also based its waiver analysis on the fact that the parents were consulting an attorney. Ms. LeBlanc was being advised by an attorney whenever she waived Adam's expulsion hearing.

[176] *Id.*

[177] Coplin, supra at 1383-84 citing D.H. Overmyer, supra at 185, 187.

[178] Rec. Doc. No. 43, Exhibit 4.

Q. You understand that right?
A. Right.
Q. And you opted for the alternative school for Adam?
A. I didn't consider I had any other option. They told me that if Adam went to alternative school and finished the alternative school, that he wouldn't be expelled.[179]

It is obvious that Ms. LeBlanc was concerned with the serious and adverse consequences of the charge and the possible sanctions when she waived Adam's expulsion hearing. She was also interested in getting Adam into the alternative school to avoid any gaps in his education. It is also clear that the defendants were concerned about Adam's continued education by its decision to place Adam in an alternative school rather than expel him from the school system. Thus, Ms. LeBlanc evaluated the potential repercussions of not placing Adam in the alternative school and made a knowing, rational decision to waive the expulsion hearing to avoid any further delay in Adam's education. This waiver was voluntary, knowing, intelligent, and non-coercive with full awareness of the consequences. Under these facts and the jurisprudence discussed above, there was no procedural due process violation because Ms. LeBlanc waived the hearing on behalf of her son.

C. Qualified Immunity

The defendants assert qualified immunity as a special defense. Although the Court has found no merit to plaintiffs' constitutional claims, the Court believes it should also consider the merits of the qualified immunity defense. School officials are entitled to qualified immunity from

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[179] Rec. Doc. No. 43, Exhibit 3.

liability for damages arising under section 1983.[180] The United States Supreme Court approved the qualified immunity defense in 1975 fearing the most capable candidates for school board positions would be deterred from serving if their day to day act ions were subj ected to the heavy burden of potential personal liability for violating students' constitutional rights.[181] The defendants claim that Principal Conrad Braud is entitled to qualified immunity in his individual capacity. Defendants further claim that Superintendent Robert Cloutare and Principal Conrad Braud cannot be liable in their official capacities under section 1983 since plaintiffs have not submitted any evidence which established that the alleged deprivation of Adam Porter1s constitutional rights was related to a policy or custom.

1. Whether Conrad Braud is entitled to qualified immunity in his individual capacity

Qualified immunity protects officials from section 1983 liability provided their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known.[182] When determining if a person acting in his personal capacity is entitled to qualified immunity, the inquiry involves a two step analysis. First, courts must determine whether the plaintiff has alleged a violation of a clearly established right. If the plaintiff has sufficiently alleged a violation of a clearly established right, the court must then determine whether the defendant's acts were objectively reasonable in light of the clearly established law at the time the defendant

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[180] *Wood v. Strickland,* 420 U.S. *308,* 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

[181] *Id.* at 319-20("The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources were a likely prospect during their tenure.").

[182] *Chiu* v. *Plano Independent School Dist. 1* 260 F.3d 330, 342 (5th Cir. 2001).

acted.[183] Once the court determines the official's conduct does not violate a clearly established statutory or constitutional right which a reasonable person would have known, then qualified immunity acts as a complete defense to the lawsuit. It is unnecessary for courts to reach the second prong of the qualified immunity test if the plaintiff fails to submit the requisite summary judgment evidence that the individual defendant violated a clearly established constitutional right.[184]

Because this Court has determined that none of Adam's constitutional rights were violated, the Court is not required to reach the qualified immunity question as noted earlier. However, out of an abundance of caution, this Court will address the applicability of the qualified immunity defense. The Court will first determine if Braud violated one of Adam's clearly established constitutional rights. For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. A right is clearly established only if it would be clear to a reasonable actor that his conduct was unlawful under the particular facts involved. The right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.[185] The Court finds that Braud did not violate one of Adam's clearly established rights under the facts of this case. The Court's conclusion that none of Adam's constitutional rights were violated supports this finding. Further, the sparse jurisprudence on how school officials should react in similar situations also

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[183] *Anderson v. Pasadena Independent School Dist.*, 184 F.3d 4391 443 (5th Cir. 1999) *i Meyer* v. *Austin Independent School Dist.*, 161 F.3d 271, 273-74 (5th Cir. 1998) *i* and *Systems Contractors Corp.* v. *Orleans Parish School Ed.*, 148 F.3d 571, 574 (5th Cir. 1998).

[184] *Hassan, supra* at 1079

[185] *Saucier v. Katz*, 533 U.S. 194, 202,121 S.Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

supports the conclusion that no clearly established right has been violated. "If the law did not put the [actor] on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."[186]

Thus, the Court finds that none of Adam's clearly established rights were violated by Braud in his individual capacity. Even if this Court were to find that one or more of the rights asserted by plaintiff was were violated was clearly established, Braud is still entitled to qualified immunity under the second inquiry the Court must make. Under the second inquiry, the Court must determine if the defendant's acts were objectively reasonable in light of the law clearly established at the time the defendant acted. If the law is clearly established, an actor is still entitled to qualified immunity if at the time of the action, the actor believed his actions were objectively legally reasonable.[187] "Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' But if 'it would be clear to a reasonable [actor] that his conduct was unlawful in the situation he confronted,' then qualified immunity does not apply. If on the other hand, 'officers *of* reasonable competence could disagree on the issue, immunity should be recognized.'"[188] Braud's actions were objectively reasonable at the time he acted. In fact, Braud was doing exactly what he or any other reasonable principal should have done under the facts presented. Braud was charged with the responsibility *of* protecting all EAHS students, and insuring that Adam did not pose a danger to the other students, faculty and property *of* EAHS. The action he took was in the performance *of* this important responsibility and duty. There was no evidence presented which would support the conclusion that Braud was ever acting in bad

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[186] Id. at 202, 2156-57.

[187] *Nunez v. Simms*, 341 F.3d 385, 387 (5th Cir. 2003).

[188] *Hope v. Pelzer*, 536 U.S. 730, 752, 122 S.Ct. 2508, 2522, 153 L. Ed . 2 d 666 (2002)

faith or without regard to Adam's constitutional rights. Thus, the Court finds that Braud is entitled to qualified immunity even if Adam's rights were found to be clearly established.[189]

2. Whether Robert Cloutare and Conrad Braud are subject to section 1983 liability in their official capacities

The distinction between a state official being sued in a personal and official capacity was clarified by the United States Supreme Court in *Hafer v. Melo.*[190] A suit against a state official in his official capacity is treated as a suit against the state. Because the real party in interest in an official-capacity suit is the governmental entity and not the named individual, the "entity's 'policy or custom' must have played a part in the violation of federal law."[191] Neither a state nor its officials acting in their official capacities are "persons" for section 1983 purposes.[192] For this reason, official-capacity suits are governed by the rules pertaining to municipal and state governmental liability.[193] In contrast, personal-capacity suits seek to impose individual liability upon a government officer for actions taken under the color of state law. A showing that the official, acting under color of state law, caused the deprivation of a federal right is enough to establish personal liability in a section 1983 action.[194]

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[189] For Braud not to have acted and then a student or teacher would have been injured or killed or school property damaged or destroyed may have subjected the principal to damage suits or criticism.

[190] 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

[191] *Id.* at 25 361-62 *citing Kentucky v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985).

[192] *Id.* at 26, 362.

[193] *Turner v. Houma Mun. Fire and Police Civil Servo Ed.,* 229 F.3d 478, 483 (5th Cir. 2000).

[194] *Hafer, supra* at 26, 362

Because official-capacity suits are governed by the rules pertaining to municipal and state governmental liability, qualified immunity does not pertain to official-capacity claims for injunctive or declaratory relief as these claims are considered to be official capacity claims against the relevant government entity.[195] Thus, qualified immunity would not necessarily be the ground for dismissing plaintiffs' case against Cloutare and Braud in their official capacities. However, because Cloutare and Braud are being treated as arms of the school board for purposes of the official capacity suit, plaintiffs are required to prove that the Ascension Parish School Board or EARS has a policy or custom that caused the deprivation of Adam's constitutional rights.[196] Plaintiffs have failed to submit any evidence to establish whether a policy or custom in the Ascension Parish School Board or EAHS led to a constitutional deprivation. Plaintiffs also failed to present facts to even create a material issue of fact in dispute which would cause the court to deny defendants' motion for summery judgment. Accordingly, the Court finds as a matter of law that no policy or custom exists at the Ascension Parish School Board or EAHS which deprived Adam of his constitutional rights under the facts of this case. This conclusion is further supported by the Court's determination that none of Adam's constitutional rights were violated. In the alternative, the Court finds that even if constitutional violations had occurred, plaintiffs' official capacity claims must still fail because plaintiffs have not introduced any evidence in the record to establish that a policy or custom of the Ascension Parish School Board or

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[195] *See Valley v. Rapides Parish School Ed.*, 118 F.3d 1047, 1051, n.l (5th Cir. 1997) ("It is well established law in this Circuit that the defenses of qualified and absolute immunity do not extend to suits for injunctive relief under [section 1983]). *See also Chrissy F. v. Mississippi Dept. of Pub. Welfare*, 925 F.2d 844, 849 (5th Cir. 1991).

[196] *See Monnell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

EAHS systematically deprives students of their constitutional rights. The only evidence presented by plaintiffs pertained to their individual claims. Based on the law and evidence in the record, summary judgment on the official capacity claims is granted.

D. Attorneys Fees under 42 U.S.C. § 1988

The Court has reviewed the record and determined that defendants are not entitled to attorneys fees under 42 D.S.C. § 1988 and the facts of this case. The fact that defendants have successfully defended their suit does not mean that they are entitled to attorney's fees under Section 1988. The issues involved in this case cannot be said to be frivolous even though the Court found plaintiff's claims to be without merit under the law and facts *of* this case.

III. Conclusion

First Amendment protection cannot be provided to a high school student's graphic drawing of his high school being soaked with gasoline, surrounded by an individual with a torch and a missile, and illustrating administrators being assaulted and its students subjected to racial explicatives and slogans. This conclusion is supported under a *pure-Tinker* analysis, the true-threat inquiry, and the Fifth Circuit's approach in *Canady*. Thus, plaintiffs' First Amendment claims must be dismissed as a matter of law under the facts of this case.

This Court also finds that where a school administrator discovers a drawing like the one involved in this case, the reasonableness requirement for a search or seizure is satisfied and plaintiffs' Fourth Amendment rights were not violated under the facts of this case. Therefore, plaintiffs' Fourth Amendment claims are dismissed as a matter of law.

There was no procedural due process violation under the facts of this case. Even though no formal hearing was held, Adam admitted the violation of the rule for which he was removed from EAHS and sent to an alternative school. There is also no procedural violation of the student's right where his mother waives such a hearing after it is offered. Thus, plaintiffs' procedural due process claims are dismissed as a matter of law under the facts of this case.

Even if these constitutional claims were found viable, plaintiffs' Section 1983 claims against Superintendent Robert Cloutare and Principal Conrad Braud, both in their individual and official capacities, are barred by the doctrine of qualified immunity. The claims against Braud individually are barred because plaintiffs have failed to show any clearly established right was violated, and alternatively, Braud's actions were objectively reasonable. The claims against Cloutare and Braud in their official capacities are barred because plaintiffs failed to show that the Ascension Parish School Board or EAHS has a policy or custom of systematically depriving students of their constitutional rights.

Finally, defendants' claims for attorney's fees are denied.

Therefore,

IT IS ORDERED that defendants' motion for summary judgment is granted.

IT IS FURTHER ORDERED that plaintiffs' suit be dismissed with prejudice.

IT IS FURTHER ORDERED that defendants' demand for attorneys fees under 42 U.S.C. § 1988 is denied.

Judgment shall be entered accordingly.

Baton Rouge, Louisiana, January _____, 2004.

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FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES CONSTITUTION

First Amendment - religious and political freedom

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment - citizens of the United States

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law